UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
SAM ARMSTRONG RIGGS,	)	
	)	
Defendants.	)	**CASE NO. 93-C-467-B**

O R D E R

Upon the motion of the plaintiff, United States of America, to which there is no objection, it is hereby **ORDERED** that all claims against the defendant, Sam Armstrong Riggs, be dismissed without prejudice, the parties to bear their own costs and attorneys' fees.

Dated this 9th day of Sept, 1993.

S/ THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

WYN DEE BAKER, OBA #465
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103

DATE 9-10-93

FILED

SEP 9 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JUANITA BUCHANAN,

Plaintiff,

v.

ARA SERVICES, INC., OXY USA, INC., and JEANETTE KIRKEGUAARD, and WILLIAM RUSSO,

Defendants.

Case No. 91-C-239-E

ORDER ALLOWING DISMISSAL WITH PREJUDICE

This matter came on before the Court this 9th day of September, 1993, upon the parties' Stipulation of Dismissal With Prejudice, and for good cause shown, it is therefore

ORDERED, ADJUDGED AND DECREED, that Plaintiff's cause of action against the Defendants is hereby dismissed with prejudice with each side to bear its own costs and attorney fees.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

DKM-2565.0

IN IE UNITED STATES DISTRICT URT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 9 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

NORDAM, an Oklahoma General Partnership,

Plaintiff

vs.

BURBANK AERONAUTICAL CORPORATION and BURBANK AERONAUTICAL CORPORATION II,

Defendants.

Case No 91-C-347-E

JUDGMENT

In accordance with the Order filed in this case on August 31, 1993:

IT IS ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Plaintiff, NORDAM, and against Defendants Burbank Aeronautical Corporation and Burbank Aeronautical Corporation II, jointly and severally, on Plaintiff's Application filed April 9, 1992, in the amount of $23,387.59, plus post-judgment interest thereon at the statutory rate, from and after the date of entry hereof, until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Plaintiff NORDAM and against Defendants Burbank Aeronautical Corporation and Burbank Aeronautical Corporation II, on Defendants' Motion to Enforce Settlement Agreement, for Temporary Restraining Order and Preliminary Injunction filed February 11, 1993. Defendants' Motion is denied in all respects and Plaintiff is entitled to enforce forthwith this Court's March 25, 1992 Judgment against Defendants for the balance due Plaintiff pursuant to such March 25, 1992 Judgment.

S/ JAMES O. ELLISON

James O. Ellison, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 9-10-93

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

ASBESTOS HANDLERS, INC., an Oklahoma corporation,

Plaintiffs,

v.

SUN COMPANY, INC. (R & M), an Oklahoma corporation,

Defendant.

Case No. 92-C-509 B

ORDER OF DISMISSAL

This matter comes on for hearing on the Joint Stipulation of the Plaintiff, Asbestos Handlers, Inc. and Defendant, Sun Company, Inc., for a dismissal with prejudice of the above captioned cause against Sun Company, Inc. The Court, being fully advised, having reviewed the Stipulation, finds that the parties herein have entered into a compromise settlement covering all claims involved in this action, which this Court hereby approves, and that the above entitled cause should be dismissed with prejudice to the filing of a future action as to Sun Company, Inc. (R & M) pursuant to said Stipulation.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above entitled cause be and is hereby dismissed with prejudice to the filing of a future action against Sun Company, Inc. (R & M), the parties to bear their own respective costs.

Dated this 9th day of September, 1993.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT COURT JUDGE

FRAZIER, SMITH & PHILLIPS

By _____

Phil Frazier
1424 Terrace Drive
Tulsa, OK 74104-4626

Attorneys for Plaintiff

RHODES, HIERONYMUS, JONES,
TUCKER & GABLE

By _____

JOHN H. TUCKER, OBA #9110
ROBERT P. REDEMANN, OBA #7454
Bank IV Center
15 West Sixth Street, Suite 2800
Tulsa, OK 74119-5430
(918) 582-1173

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JAMES D. SIMONSEN, Plaintiff, vs. LOWRANCE ELECTRONICS COMPANY, INC., a Delaware corporation, Defendant.	)	Case No. 92-C-956-C

STIPULATON OF DISMISSAL WITH PREJUDICE

COME NOW Plaintiff and Defendant and stipulate to the Dismissal With Prejudice of the above-styled and numbered cause.

Respectfully submitted,

FRASIER & FRASIER

BY: _____

Steven R. Hickman OBA#4172
1700 Southwest Blvd, Suite 100
P. O. Box 799
Tulsa, OK 74101
918/584-4724

DOERNER, STUART, SAUNDERS, DANIEL & ANDERSON

BY: _____

Kathy R. Neal
320 S. Boston, Suite 500
Tulsa, OK 74103
918/582-1211

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

IN RE:	)	
	)	
ANTONIO BENAVIDES, III,	)	Bky. No. 91-01920-C
	)	
Debtor.	)	
	)	
ANTONIO BENAVIDES, III.,	)	Adversary No. 92-0251-C
	)	
Appellant,	)	
	)	
v.	)	Case No. 92-C-1069-E
	)	
JENNIFER G. KARBER, f/k/a JENNIFER BENAVIDES, and GROVER MISKOVSKY,	)	
	)	
Appellees.	)	

ORDER

This order pertains to the appeal of debtor Antonio Benavides, III ("debtor") of the order entered by the United States Bankruptcy Court for the Northern District of Oklahoma on November 12, 1992, finding that the attorney fees awarded to debtor's ex-wife in their divorce proceeding were in the nature of alimony, maintenance, or support and therefore nondischargeable under § 523(a)(5) of the Bankruptcy Code.

The Plaintiff, Jennifer Karber ("Karber"), filed for divorce in March 1988. When the parties were granted a divorce in March 1990, the decree granted custody of the minor child to Karber. Debtor was granted visitation rights and ordered to pay alimony and child support. Debtor was ordered to pay $20,782.00 in attorney fees and costs on his former wife's behalf. In awarding Karber her attorney fees, the court considered the financial means of the parties, the impact of attorney fee obligations on orders relating to maintenance and support, the actions of the parties and their attorneys during the

proceedings, and the amount of fees. On June 11, 1991, debtor filed for bankruptcy under Chapter 7 of the Bankruptcy Code, listing his obligation to his former wife for attorney fees as an unsecured claim.

On August 30, 1991, the law firm of Miskovsky, Sullivan, Miskovsky & Associates filed a complaint objecting to the discharge of the attorney's fee. A trial on the issue was held on October 23, 1992, in the United States Bankruptcy Court for the Northern District of Oklahoma, and the bankruptcy judge found that $18,703.80 was a nondischargeable debt pursuant to § 523(a)(5) of the Bankruptcy Code.

The bankruptcy judge concluded that "ninety percent of the time spent by the Plaintiff's attorney pertained to the issues of child custody, child support and visitation." (Memorandum Opinion, p.3). The judge then determined that the dispositive issue in the case was whether litigation concerning child custody and visitation was the same as "alimony, maintenance or support" for purposes of 11 U.S.C. § 523(a)(5) of the Bankruptcy Code. (Memorandum Opinion, p.3). That section of the Bankruptcy Code excepts from a debtor's discharge any debt "to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child . . . [which] is actually in the nature of alimony, maintenance, or support."

The bankruptcy judge relied on the case of In re Poe, 118 B.R. 809 (Bankr. N.D. Okla. 1990), where the court held that attorney fees incurred in a post-decree child custody dispute were nondischargeable under § 523(a)(5). In determining that child custody litigation is "in the nature of alimony, maintenance, or support," the Poe court stated:

> Although Federal law controls, Federal bankruptcy courts may look to State law to help them ascertain the

> purposes for which an award was made. In Oklahoma, child custody is assigned according to the best interests of the child . . . . In this Court's view, the best interest of the child is an inseparable element of the child's "support" -- put another way, 11 U.S.C. § 523(a)(5) should be read as using the term "support" in a realistic manner; the term should not be read so narrowly as to exclude everything bearing on the welfare of the child but the bare paying of bills on the child's behalf. Since determination of child custody is essential to the child's proper "support", attorney fees incurred and awarded in child custody litigation should likewise be considered as obligations for "support," at least in the absence of clear indication of special circumstances to the contrary.

Id. at 812.

The bankruptcy court noted that other courts had held that attorney fees incurred in child custody litigation were nondischargeable. In re Gideon, 31 B.R. 942 (Bankr. D. Colo. 1983); In re Ray, 143 B.R. 937 (Bankr. D. Colo. 1992); In re Peters, 133 B.R. 291 (Bankr. S.D.N.Y. 1991); Adams v. Zentz, 127 B.R. 444 (Bankr. W.D. Mo. 1991).

The bankruptcy court discussed debtor's two arguments as to why the attorney fees in the case should not be excepted from discharge under § 523(a)(5). Debtor maintained that the fees were not incurred to secure "support", as that term is used in § 523(a)(5), because most of the litigation in the divorce proceedings was concerned with child custody and visitation issues. Debtor also argued that § 523(a)(5) should be confined to the "plain meaning of its terms," citing several Supreme Court cases which found that terms of the Bankruptcy Code should be interpreted according to their plain meaning. Since § 523(a)(5) does not expressly except from discharge attorney fees arising out of a child custody or visitation dispute, debtor argued that the award of fees in this case was dischargeable. The bankruptcy court noted that debtor's "plain meaning" argument had

been made before and rejected in In re Poe, 118 B.R. at 812, Miskovsky v. Skinner, 88 B.R. 360, 361 (W.D. Okla. 1987), In re Vazquez, 92 B.R. 533, 535 (S.D. Fla. 1988), and In re Schwartz, 53 B.R. 407 (Bankr. S.D.N.Y. 1985).

The bankruptcy court concluded that the majority of courts had found that attorney fees incurred in child custody and visitation litigation were "in the nature of alimony, maintenance, or support" and therefore nondischargeable under § 523(a)(5). Such a construction did not contravene the plain meaning standard, because the statute only requires that a debt fall in one of those three categories, not that it be fees incurred litigating those issues.

This court has jurisdiction to hear appeals from final decisions of the bankruptcy court under 28 U.S.C. § 158(a). Bankruptcy Rule 8013 sets forth a "clearly erroneous" standard for appellate view of bankruptcy rulings with respect to findings of fact. In re: Morrissey, 717 F.2d 100, 104 (3rd Cir. 1983). However, this "clearly erroneous" standard does not apply to review of findings of law or mixed questions of law and fact, which are subject to the de novo standard of review. In re: Ruti-Sweetwater, Inc., 836 F.2d 1263, 1266 (10th Cir. 1988); In re: Mullett, 817 F.2d 677, 679 (10th Cir. 1987). This appeal challenges the legal conclusion drawn from the facts presented at trial, so de novo review is proper.

Having reviewed the evidence before the bankruptcy court at the time it made the ruling being appealed, this court finds that the bankruptcy court did not err in following earlier federal district court decisions, including the Poe decision by this court. While it is true, as debtor argues, that recent Supreme Court cases have found that the bankruptcy

code should be interpreted according to the plain meaning of its terms, and the code did not explicitly except attorney's fees from discharge, the more appropriate test to determine dischargeability of such fees is to determine the character of the litigation in which they were incurred. See, In re Poe, 118 B.R. at 811; Miskovsky v. Skinner, 88 B.R. at 361.

The bankruptcy judge's finding that ninety percent of the time spent by Karber's attorney pertained to issues of child custody, child support, and visitation was not clearly erroneous. His conclusion that the fees were therefore in the nature of alimony, maintenance, or support and nondischargeable under § 523(a)(5) is affirmed.

Dated this 8th day of September, 1993.

JAMES O. ELLISON, CHIEF
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BRISTOL RESOURCES CORP.,

PLAINTIFF,

v. Case No. 93-C-27-E

MOBIL PRODUCING TEXAS ET AL,

DEFENDANTS.

O R D E R

Rule 35(a) of the Rules of the United States District Court for the Northern District of Oklahoma provides as follows:

> *(a) In any case in which no action has been taken by the parties for six (6) months, it shall be the duty of the Clerk to mail notice thereof to counsel of record or to the parties, if their post office addresses are known. If such notice has been given and no action has been taken in the case within thirty (30) days of the date of the notice, an order of dismissal may, in the Court's discretion, be entered.*

In the action herein, notice pursuant to Rule 35(a) was mailed to counsel of record or to the parties, at their last address of record with the Court, on August 5, 1993. No action has been taken in the case within thirty (30) days of the date of the notice.

Therefore, it is the Order of the Court that this action is in all respects dismissed.

Dated this 7th day of September, 1993.

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ATLANTIC RICHFIELD COMPANY, Plaintiff, v. AMERICAN AIRLINES, INC. et al., Defendants. AND CONSOLIDATED ACTIONS.	)	Consolidated Case Nos. 89-C-868 B 89-C-869 B 90-C-859 B

STIPULATION OF DISMISSAL WITHOUT PREJUDICE OF CERTAIN CROSS-CLAIMS ONLY

Group I Defendants, Baker Hughes Incorporated, Borg-Warner Corporation, Burgess-Norton Mfg. Co., Chief Chemical & Supply, Inc., Cintas Corporation, Inc., Crane Carrier Corp., Dover Corporation, Groendyke Transport, Inc., Jerry Inman Trucking, Inc., Kansas Industrial Environmental Services, Inc., McDonnell Douglas Corporation, MK&O Coach Lines, Paccar, Inc., Phillips Petroleum Company, Ramsey Winch Company, Ryder Truck Rental, Inc., The Uniroyal Goodrich Tire Company, Webco Industries, Inc., and Whirlpool Corporation (hereinafter referred to as the "Group I Defendants"), Vacuum & Pressure Tank Truck Services, Inc., Vacuum Refining Company, and Glenn Wynn, (hereinafter referred to as the "Group III Defendants"), and all members of the Group IV Defendants (hereinafter referred to as the "Group IV Defendants"), pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure stipulate to the dismissal, without prejudice, of certain cross-claims only. The dismissed cross-claims are as follows:

- From Answer of Group I Defendants to the Third Consolidated Amended Complaint filed January 12, 1993 (Docket No. 585):

> Third Cross-Claim for Relief Against Wynn Defendants-Breach of Contract
>
> Fourth Cross-Claim for Relief Against Wynn Defendants-Negligence
>
> Fifth Cross-Claim for Relief Against Wynn Defendants-Fraudulent Transfer

- From Answer and Counter-Claim of Defendant Group IV to Plaintiff's Third Consolidated Amended Complaint filed January 11, 1993 (Docket No. 580):

> Cross-Claim against Glenn Wynn, Jr. for fraudulent transfer.

No other cross-claims are affected by this Stipulation.

Respectfully submitted,

By: Claire V Eagan

Claire V. Eagan, OBA #554
Susan L. Gates, OBA #11365
Michael D. Graves, OBA #3539
Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C.
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172
(918) 588-2700

LEAD COUNSEL FOR
GROUP I DEFENDANTS

By: _____

Steven M. Harris, OBA #3913
Doyle & Harris
P.O. Box 1679
Tulsa, Oklahoma 74101
(918) 743-1276

LEAD COUNSEL FOR GROUP III DEFENDANTS

By: _____

John H. Tucker, OBA #9110
Rhodes, Hieronymus, Jones,
Tucker & Gable
2800 Fourth National Bank Bldg.
Tulsa, Oklahoma 74119
(918) 582-1173

LEAD COUNSEL FOR GROUP IV DEFENDANTS

CERTIFICATE OF MAILING

I, the undersigned, do hereby certify that on the 17 day of September, 1993, a true and correct copy of the above and foregoing was forwarded by U.S. Mail, with proper postage thereon fully prepaid, to the following counsel of record:

Professor Martin A. Frey
Tulsa University
College of Law
3120 E. 4th Place
Tulsa, Oklahoma 74104

William C. Anderson, Esq.
Doerner, Stuart, Saunders,
Daniel & Anderson
320 S. Boston, Suite 500
Tulsa, Oklahoma 74103

Steve Harris, Esq.
Doyle & Harris
P.O. Box 1679
Tulsa, Oklahoma 74101

John H. Tucker
Rhodes, Hieronymus, Jones
Tucker & Gable
2800 Fourth National Bldg.
Tulsa, Oklahoma 74119

Gary A. Eaton
1717 E. 15th Street
Tulsa, Oklahoma 74104

Bradley Bridgewater
Senior Attorney
Environment & Natural Resources
U.S. Department of Justice
Suite 945, North Tower
999 Eighteenth Street
Denver, Colorado 80202

Larry G. Gutterridge, Esq.
Sidley & Austin
555 West Fifth Street
Los Angeles, California
90013-1010

Charles W. Shipley, Esq.
Shipley, Inhofe & Strecker
3600 First National Tower
15 East 5th Street
Tulsa, Oklahoma 74103-4348

David W. Zugschwerdt, Esq.
David M. Thompson, Esq.
U.S. Dept. of Justice
Environment & Natural Resources
Division
P.O. Box 23986
Washington, DC 20026-3986

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ATLANTIC RICHFIELD COMPANY, Plaintiff, v. AMERICAN AIRLINES, INC., Et., Al., Defendants.	)	Consolidated Cases Nos. 89-C-868-B 89-C-896-B 90-C-859-B

FINAL JUDGMENT AND ORDER OF DISMISSAL WITH PREJUDICE

Now on this 9th day of ~~August~~ Sept, 1993, this matter comes on for consideration of the Plaintiff Atlantic Richfield Company's ("ARCO") NOTICE OF MOTION AND MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT (docket no. 487) filed herein on November 2, 1992. The Plaintiff ARCO appears by its attorney, Larry Gutterridge, the Defendants appears by their respective lead counsel, and William Anderson appears as liaison counsel. The Court having examined the files and records and proceedings herein, having reviewed and considered the terms and conditions of the settlements in question, having reviewed and considered the Magistrate's Report and Recommendation, and being fully advised and informed in the premises FINDS and ADJUDGES, ORDERS and DECREES:

1. The settlement encompassed by the Notice of Motion and Motion for Determination of Good Faith Settlement (docket no. 487) in the above captioned action between the Plaintiff ARCO and Defendant Crane Company is found to be in good faith, and a final judgment barring all claims against Defendant Crane Company associated with the Site under state and federal law, except to the extent that such claims are preserved by the settlement, and except

for any claims for arranging for disposal of off-site hazardous substances, should be and is hereby entered.

2. Each and every claim asserted by the Plaintiff ARCO against Defendant Crane Company should be and is hereby dismissed in its entirety on the merits, with prejudice and without costs.

3. Each and every claim "deemed filed" by or against Defendant Crane Company pursuant to the terms of the First Amended Case Management Order, Section VII.B., filed March 6, 1992, is hereby dismissed in its entirety on the merits, with prejudice and without costs.

4. In accordance with the terms of the agreements with Defendant Crane Company hereinafter referred to as the Agreement, this Judgment shall be conditioned upon the Agreement being and remaining valid and in effect.

5. Entry into the Agreement by an ineligible entity renders the Agreement null and void. An eligible entity is a generator or transporter, or both, of material to the Site, with a volume of less than or equal to 100,000 gallons.

6. Any breach, whether by omission or commission, whether intentional or non-intentional, of a Settling Party's representation and warranty that, it neither possesses, or has a right to possess, nor is aware of any information which indicates that it is responsible for additional or greater volume than is set forth in the Volume Report attached to the Agreement, which has not been included in the documentation provided to ARCO in support of its offer to enter the Agreement, renders the Agreement null and void.

7. In the event that the Agreement is or becomes null and void, this Judgment along with all orders entered in conjunction with the Agreement shall be vacated nunc pro tunc, the settlement reflected in the Agreement shall be terminated pursuant to its terms and the parties to the vacated Agreement shall be deemed to have reverted to their respective status and position in the Action as of the date immediately prior to the execution of the Agreement.

8. Nothing contained in this Judgment and Order shall be construed to affect the rights of the Plaintiff ARCO or Defendant Crane Company respect to claims which are preserved by the settlement.

9. There being no just reason to delay the entry of this Judgment, this Court hereby directs entry of this final Judgment and Order of Dismissal pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

Dated: 9-8-93

S/ THOMAS R. BRETT

Thomas R. Brett
United States District Court Judge

Presented by:

Gary A. Eaton, Attorney
for Plaintiff, Atlantic
Richfield Company

William Anderson, Esq.
Liaison Counsel

AXA93C27.SEL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RICK HOWARD and PAM HOWARD Plaintiffs, vs. WESTINGHOUSE ELECTRIC CORP., TECUMSEH PRODUCTS CO., and DELORES NEWMAN, Defendants.	)	Case No. 93-C-361-B

O R D E R

The Court has for consideration Plaintiffs' Motion to Remand (Docket # 5) this matter to the District Court of Mayes County, Oklahoma, where it was originally filed.

I. STATEMENT OF THE CASE

On or about September 3, 1990, Plaintiff Rick Howard went to Defendant Delores Newman's home to repair her air conditioner. While conducting an initial test of the air conditioner, it exploded in flames causing serious and permanent injury to Plaintiff Rick Howard. The air conditioner, a "ThriftAir", was designed, manufactured, assembled, packaged, sold, distributed and advertised by Defendant, Westinghouse Electric Corporation ("Westinghouse").[1] The compressor in the unit was manufactured by Defendant Tecumseh Products Company ("Tecumseh").

[1] Westinghouse did not design, manufacture, assemble, purchase, sell, distribute, or advertise many of the component parts of the Westinghouse "ThriftAir." (Answer of Defendant Westinghouse to Plaintiff's Interrogatory No. 3).

21

The Plaintiffs filed this lawsuit on May 1, 1992, in the District Court of Mayes County, Oklahoma, styled Rick Howard and Pam Howard v. Westinghouse Elec. Corp., Tecumseh Prod. Co. and Delores Newman, Case No. C-92-131. Count I alleges a products liability claim against Westinghouse and Tecumseh. Count II alleges negligence by Westinghouse and Tecumseh. Count III alleges negligence by Delores Newman.

Defendants, Westinghouse, Tecumseh, and Newman, pursuant to 28 U.S.C. §§ 1441 and 1446, jointly removed the case from Oklahoma State Court to the United States District Court for the Northern District of Oklahoma (Docket # 1). The Defendants alleged in their Notice of Removal that Plaintiffs fraudulently joined Defendant Delores Newman, a resident citizen of the forum state, to defeat diversity of citizenship under 28 U.S.C. §1332. Defendants allege the joinder of Newman was fraudulent because the Plaintiffs failed to state a cause of action against Newman. Defendants also allege that Plaintiffs joined Defendant Newman in bad faith to prevent removal on the basis of diversity of citizenship.

Plaintiffs seek to have this case remanded to the County Court of Mayes County, Oklahoma. In support of their Motion To Remand, Plaintiffs assert three reasons why naming Newman as a Defendant does not constitute fraudulent joinder and why removal was improper. First, Plaintiffs assert that Defendants have failed to prove the impossibility of establishing a cause of action against Newman. (Plaintiff's Reply Brief, p. 1). Secondly, Plaintiffs allege that removal is not appropriate unless the matter can be

resolved by summary judgement against the non-diverse Defendant. (Plaintiff's Reply Brief, p. 3). Finally, Plaintiffs also argue that an "alternative negligence" claim based on the doctrine of res ipsa loquitur is relevant as a possible way to establish liability against Defendant Newman.

According to Plaintiff's Petition, Newman, an elderly homeowner, "failed to exercise due care when she failed to warn the Plaintiff Rick Howard, about the electrical problems that she **knew** of related to the air conditioner." (See, Petition ¶ 20) (emphasis added). However, Plaintiffs have failed to provide any evidence that Newman was aware of any specific "electrical problems" with the air conditioner. Plaintiff Rick Howard testified:

Q. And from your knowledge, [Newman] doesn't know anything about repair of an air conditioner, does she?

A. No

Howard Deposition, p. 171, lines 5-7.

Q. All right. The air conditioner wasn't blowing cold air?

A. That's right.

Q. Mrs. Newman didn't know why?

A. That's right.

Q. And that's why her son-in-law called you, to come over and see why, is that true?

A. That's true.

Howard Deposition, p. 172, lines 10-17.

Q. And if there was an electrical problem she was having, she wouldn't know what it was, would she?

A. I wouldn't think so.

Howard Deposition, p. 173, lines 3-5.

Q. And she knows nothing about electrical problems, to your knowledge?

A. That's right.

Q. So when you say in your petition that she failed to warn you about the electrical problems, she probably didn't know anything about any electrical problems, did she?

A. Not to my knowledge, sir.

Howard Deposition, p. 179, lines 11-18.

The evidence further reveals that upon arriving at Defendant Newman's home, Plaintiff did not attempt to personally speak with the Defendant about any possible problems she was having with her air conditioner.

II. Fraudulent Joinder Standard

When a nondiverse defendant is named in a petition for the sole purpose of defeating the ability of the defendant to remove the case to Federal Court, the court may disregard the joinder and retain jurisdiction over the matter. **Wilson v. Republic Iron and Steel Co.**, 257 U.S. 92, 97 (1921). The term "fraudulent joinder" has been defined as a term of art. Fraudulent joinder "does not reflect on the integrity of a plaintiff or counsel but is merely the rubric applied when a court finds either that no cause of action is stated against the nondiverse defendant, or in fact no cause of action exists." **Lewis v. Time Inc.**, 83 F.R.D. 455, 460 (E.D. Cal. 1979) (emphasis original) (citations omitted) **aff'd** 710

F.2d 549 (9th Cir. 1983). Fraudulent joinder must be "pleaded with particularity and proven with certainty." **McLeod v. Cities Serv. Gas Co.**, 233 F.2d 242, 246 (5th Cir. 1956). Thus, no fraudulent joinder exists unless it is proven, with certainty, that the plaintiff cannot recover against the non-diverse defendant under the existing law, or given the facts presented, that no cause of action exists.

Was The Joinder of Defendant Newman Fraudulent?

Plaintiffs allege in Count III that Defendant Newman was negligent in failing to warn Plaintiff Rick Howard of the "electrical problems she knew of related to the air conditioner." (emphasis added) (Plaintiff's State Court Petition, p. 3, ¶ 20). Plaintiffs assert this argument within the context of an invitor's duty to an invitee to keep his/her premises in a reasonably safe condition and warn of latent or concealed perils known to the land owner and not to the invitee. Plaintiff further asserts that "[t]he basis of the invitor's liability rests on the owner's superior knowledge of the danger." (Plaintiff's Brief on Motion to Remand, p. 4) (citing **Beatty v. Dixon**, 408 P.2d 339, 343 (Okla. 1965). However, Plaintiff Rick Howard was a repairman called to Newman's home to repair her air conditioner, thus Plaintiff was an independent contractor. **Marvel v. U.S.**, 719 F.2d 1507, 1514 (10th Cir. 1983).

The facts established by Plaintiff's own deposition demonstrate that he was aware that Newman did not have any knowledge as to why her air conditioner was only blowing hot air.

(Howard Deposition, p. 179, lines 11-18). Plaintiff Rick Howard is alleged to have been the expert as to the repair of the air conditioning unit. It is odd that Plaintiffs would allege that Newman failed to warn about the electrical danger when Plaintiff himself admits she would not have had any knowledge as to the units dangerous condition. Furthermore, evidence reveals that the unit's fan motor was working properly because the unit was capable of blowing hot air. (Howard Deposition, p. 172). Therefore, even assuming Newman had investigated the problem with her air conditioner, the ability of the fan motor to work would have given the outward appearance that the unit's problem was not electrical.

An owner who invites a repairman to his/her premises "can usually assume that an independent contractor will perform his responsibilities in a safe and workmanlike manner taking proper care and precautions to assure his own safety. Therefore, an owner/occupier is usually not liable for injuries arising from the contractor's performance of the work." **Remuda Oil & Gas Co. v. Nobles**, 613 S.W.2d 312, 314 (Tex.Ct.App. 1981).

This Court finds that Defendant Newman did not have any superior knowledge about electrical or other hazardous problems with her air conditioner that possibly could give rise to a negligence cause of action. Although Plaintiff Rick Howard was not an ordinary invitee, if Defendant Newman was required to give a warning to the Plaintiff, any such warning was given by notifying Plaintiff of the malfunctioning condition of the air conditioner.

Plaintiff also asserts that the doctrine of *res ipsa loquitur* should

apply to the facts of this case. The phrase *res ipsa loquitur* is latin for "the thing speaks for itself." **Sisson v. Elkins**, 801 P.2d 722, 724 (Okla. 1990). "The mere fact that an accident has occurred under mysterious or unexplained circumstances provides no basis for application of the doctrine which, as so often pointed out, is a rule of evidence only." **St. John's Hosp. & Sch. of Nursing v. Chapman**, 434 P.2d 160, 165 (Okla. 1967) (citing **Keefer v. Public Serv. Co. of Oklahoma**, 90 P.2d 409 (Okla. 1939); **Cosden v. Wright**, 211 P.2d 523 (Okla. 1949)). The purpose of *res ipsa loquitur* is to assist a plaintiff in making a prima facie case of negligence in circumstances where direct proof of negligence was beyond the power of the plaintiff, but within the control of the defendant.

A prima facie case of res ipsa loquitur under the law of Oklahoma is established when the plaintiff proves: "(1) the event is of a kind which ordinarily does not occur in the absence of someone's negligence, (2) the accident was caused by an agency or instrumentality within the exclusive control of the defendant, and (3) the accident was not due to any voluntary action or contribution on the part of the plaintiff." **Collins v. N-Ren Corp.**, 604 F.2d 659, 661 (10th Cir. 1979) (quoting **Federal Ins. Co. v. U.S.**, 538 F.2d 300 (10th Cir. 1976)). The Plaintiffs have failed to allege facts sufficient to justify the application of the doctrine in this case.

The Plaintiffs have failed to establish the applicability of the doctrine for several reasons. First of all, it is well within Plaintiff's power to present evidence of Defendant Newman's

negligence. Therefore, neither party is in a better position to know what caused the accident. Secondly, from the facts alleged, it is not apparent that Newman had exclusive control over the air conditioning unit at the time of the accident. Rick Howard's deposition reveals that at the time of the accident, he had exclusive control over the unit. The only control Newman had over the unit was that the unit was located on her property at the time of the accident.

The third element for the doctrine of *res ipsa loquitur* requires that the accident not be a result of voluntary action or contribution on the part of the plaintiff. After examining the unit, Pettit & Pettit - Consulting Engineers, Inc., provided their professional opinions that the accident was caused, in part, when "[t]he electrician accidently broke the common terminal while trying to measure the compressor's amperes. Leaking oil (under some refrigerant pressure) from the hole where the terminal broke, was ignited by (1) the electrical arcing on the white conductor and (2) arcing when the connector welded to the metal strap." (Pettit Consulting Engineers' Opinion, pg. 2). In the consultants opinions, Plaintiff Rick Howard may have contributed to the accident. Thus, this Court finds the doctrine of *res ipsa loquitur* is not applicable to the facts of this case.

For the foregoing reasons, this Court finds that Plaintiffs have not alleged facts sufficient to state a cause of action against Defendant Newman, nor could existing law provide a recovery to the Plaintiff on any alleged theory. Finding that Defendant

Newman was fraudulently joined, Plaintiff's Motion To Remand is hereby DENIED and Plaintiffs' claim against Newman should be and is hereby DISMISSED.

IT IS SO ORDERED this 8th day of September, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GRAIN DEALERS MUTUAL INSURANCE COMPANY, an Indianapolis corporation,

Plaintiff,

vs.

LAKE SIDE STATE BANK, an Oklahoma corporation, et al.,

Defendants.

No. 92-C-47-E

ORDER AND JUDGMENT

The Court has for consideration the cross-motions of Insurer Plaintiff and Insured Defendant for Summary Judgment (docket #s 9 and 11, respectively) as well as Insured Defendant's motion for hearing thereon (docket #22).

The Court finds that the record adequately presents the issues; therefore a hearing thereon is unnecessary and Insured Defendant's motion at docket #22 is denied.

The Court finds that Employee Defendant did not sue Defendant Insured under a tort of disparagement; that the policy between the Insurer Plaintiff and the Insured Defendant does not cover the incident complained of by Employee Defendant; therefore Insurer Plaintiff's motion is granted; Insured Defendant's motion is denied. The counterclaim is dismissed. Judgment is entered in favor of Insurer Plaintiff. The case is dismissed.

ORDERED this 9th day of September, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOSEPH ANGELO DICESARE,

Plaintiff,

vs.

DAVID POPLIN, et al.,

Defendant.

No. 91-C-274-E

O R D E R

On the 22nd day of October, 1992, Plaintiff Joseph Angelo Dicesare filed a motion requesting a stay pending his appeal from the order and judgment of this court filed October 1, 1992. On March 22, 1993, the Tenth Circuit Court of Appeals issued its order and judgment affirming the decision of this court. Accordingly, it is not necessary that the action remain upon the calendar of the court.

IT IS THEREFORE ORDERED that Plaintiff's motion for stay pending appeal is hereby moot.

IT IS FURTHER ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen his proceedings for good cause shown. The court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within thirty (30) days of the entry of this order.

ORDERED this 8th day of September, 1993.

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JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, v. Raymond Bruner, Defendant.	Civil Action: 93-C-656-E

DEFAULT JUDGMENT

This matter comes on for consideration this 8 day of Sept, 1993, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney, and the Defendant, Raymond Bruner, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Raymond Bruner, was served with Summons and Complaint on July 27, 1993. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Raymond Bruner, for the principal amount of $4,400.00, plus accrued interest of $2,544.49, plus interest thereafter at the rate of 7 percent per annum until judgment, a surcharge of 10% of

the amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus interest thereafter at the current legal rate of 3.43 percent per annum until paid, plus costs of this action.

S/ JAMES O. ELLISON

United States District Judge

Submitted By:

KATHLEEN BLISS ADAMS, OBA# 13625
Assistant United States Attorney
3900 United States Courthouse
333 West 4th Street
Tulsa, Oklahoma 74103
(918)581-7463

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. WILLIAM R. HAMPTON a/k/a WILLIAM RICHARD HAMPTON; BERNICE HAMPTON a/k/a BERNICE L. HAMPTON; THE PACESETTER CORPORATION; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	CIVIL ACTION NO. 93-C-650-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 8 day of Sept, 1993. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney; the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, appear not, having previously claimed no right, title or interest in the subject property; and the Defendants, William R. Hampton a/k/a William Richard Hampton; Bernice Hampton a/k/a Bernice L. Hampton; and The Pacesetter Corporation, appear not, but make default.

The Court, being fully advised and having examined the court file, finds that the Defendant, William R. Hampton a/k/a William Richard Hampton, acknowledged receipt of Summons and Complaint on August 2, 1993; the Defendant, Bernice Hampton a/k/a Bernice L. Hampton, acknowledged receipt of Summons and Complaint on August 2, 1993; the Defendant, The Pacesetter Corporation,

acknowledged receipt of Summons and Complaint on July 22, 1993; the Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on July 20, 1993; and the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on July 21, 1993.

It appears that the Defendant, County Treasurer, Tulsa County, Oklahoma, filed his Answer on August 5, 1993, disclaiming any right, title or interest in the property; the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, filed its Answer on August 10, 1993, disclaiming any right, title or interest in the property; and that the Defendants, William R. Hampton a/k/a William Richard Hampton; Bernice Hampton a/k/a Bernice L. Hampton; and The Pacesetter Corporation, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on May 20, 1992, William Richard Hampton and Bernice Hampton filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 92-01780-W and were discharged on September 11, 1992.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

The North 130.83 Feet of the South 261.66 Feet of the North 523.32 Feet of the East 500 Feet of the South East 1/4 of the South East 1/4 of Section 11, Township 17 North, Range 12 East, Tulsa County, State of Oklahoma, according to the U.S. Government Survey thereof aka 13630 S. Elwood.

The Court further finds that on July 30, 1986, the Defendants, William R. Hampton and Bernice L. Hampton, executed and delivered to CFS Mortgage Corporation, their mortgage note in the amount of $68,000.00 in monthly installments, with interest thereon at the rate of 9.5 percent (9.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, William R. Hampton and Bernice L. Hampton, executed and delivered to CFS Mortgage Corporation, a mortgage dated July 30, 1986, covering the above-described property. Said mortgage was recorded on August 12, 1986, in Book 4962, Page 1566, in the records of Tulsa County, Oklahoma. In error, the Complaint stated that the security was delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, which was a scrivener's error.

The North 130.83 Feet of the South 261.66 Feet of the North 523.32 Feet of the East 500 Feet of the South East 1/4 of the South East 1/4 of Section 11, Township 17 North, Range 12 East, Tulsa County, State of Oklahoma, according to the U.S. Government Survey thereof aka 13630 S. Elwood.

The Court further finds that on December 13, 1990, Commercial Federal Mortgage Corporation f/n/a CFS Mortgage, executed an assignment of Mortgage to the Secretary of Veterans

Affairs covering the subject property. This assignment was recorded on January 15, 1991, in Book 5298, Page 2076, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 20, 1990, the Department of Veterans Affairs executed a Modification/Reamortization agreement, pursuant to which the entire debt due on that date was made principal, and the interest rate on the above-described note and mortgage was reduced to 7.5 percent.

The Court further finds that the Defendants, William R. Hampton a/k/a William Richard Hampton and Bernice Hampton a/k/a Bernice L. Hampton, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, William R. Hampton a/k/a William Richard Hampton and Bernice Hampton a/k/a Bernice L. Hampton, are indebted to the Plaintiff in the principal sum of $65,524.37, plus interest at the rate of 7.5 percent per annum from March 1, 1992 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that the Defendants, William R. Hampton a/k/a William Richard Hampton; Bernice Hampton a/k/a Bernice L. Hampton; and The Pacesetter Corporation, are in

default and have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment in rem against the Defendants, William R. Hampton a/k/a William Richard Hampton and Bernice Hampton a/k/a Bernice L. Hampton, in the principal sum of $65,524.37, plus interest at the rate of 7.5 percent per annum from March 1, 1992 until judgment, plus interest thereafter at the current legal rate of 3.43 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, William R. Hampton a/k/a William Richard Hampton; Bernice Hampton a/k/a Bernice L. Hampton; The Pacesetter Corporation; and County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell, according to Plaintiff's election with or without appraisement, the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

for PETER BERNHARDT, OBA #741
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

Judgment of Foreclosure
Civil Action No. 93-C-650-E
PB/esr

FILED

SEP 7 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:	
REPUBLIC FINANCIAL CORPORATION, an Oklahoma Corporation,	Case No. 84-01460-W (Chapter 11)
Debtor,	
R. DOBIE LANGENKAMP, Successor Trustee,	District Court No. 91-C-244-E
Plaintiff,	
vs.	Adversary No. 86-0374-C
MACK BAUGHN and BARBARA BAUGHN,	
Defendants.	

O R D E R

This case has pursued a tortured path. On April 13, 1992, this Court vacated its original Order denying Defendants' Motion for withdrawal of reference and for jury trial. The case was, thus, reopened on April 13, 1992. On January 26, 1993, a status hearing was held before Magistrate Wolfe. Paul McBride, whose appearance had been entered in the case, did not appear; indeed, no one appeared on behalf of the Defendants. Magistrate Wagner ordered Defendants to identify their substitute counsel or to enter their pro se appearance. By letter to the Clerk of the Court the Defendants responded that they were, presently, pro se. Pursuant to the April 10, 1992 Memorandum Opinion of Judge Covey the Court entered Judgment against Defendants. By letter to the Clerk of the

Court Defendants objected. This letter was filed of record on March 29, 1993 (docket #15) as a Motion to Reconsider. Subsequently the parties reached a settlement agreement. And on April 15, 1993 the Successor Trustee, acknowledging the execution and performance of the settlement agreement by the Defendants filed his Release and Satisfaction of Judgment. Therefore, Defendants' Motion to Reconsider is denied as moot; this matter is dismissed.

So ORDERED this 7th day of September, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FRED M. SIEGMEIER,

Plaintiff,

v.

MEMOREX-TELEX CORPORATION,

Defendant.

92-C-442-B

ORDER

This matter comes on for consideration of Defendant Memorex-Telex Corporation's Motion In Limine (docket #53).

History of the case:

Plaintiff, age 56 at the time of his termination from Defendant, filed an age discrimination suit alleging violation of 29 U.S.C., § 621, et seq., against Defendant Memorex Telex Corp. Plaintiff alleged two separate age discrimination violations by Memorex, involving (1) his treatment in a reduction-in-force and (2) his treatment in a refusal to hire.

Plaintiff also alleged two additional state law claims: (1) breach of implied employment contract; and (2) a common-law tort action for discharge on the basis of age, contrary to the public policy of the State of Oklahoma, the so-called Burk[1] tort.

Plaintiff contended that after his termination, he was replaced by a younger subordinate who assumed his job responsibilities as Controller for the Original Equipment Manufacturing Division of Memorex ("OEM").

[1] Burk v. K-Mart, 770 P.2d 24 (Okl.1989).

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Additionally, Plaintiff contended that once he was removed as Controller for the OEM, he was not considered for a similar position as Controller for the newly merged Southern and South Central Regions. Plaintiff alleged that he was treated unfairly because of his age and as a result of such treatment, the new position was given to a much younger and less experienced employee.

Defendant asserted that Plaintiff's position was eliminated, along with hundreds of other positions, as a result of a downturn in Memorex's business. Defendant claimed that Plaintiff cannot establish a prima facie case, despite the fact that some of Plaintiff's duties have been assumed by other employees.

Additionally, Defendant claimed Plaintiff was considered for the Controller position for the Southern/South Central Region. Defendant contended that the decision to offer the position to someone else was based on a number of business factors, not the age of Plaintiff.

Defendant claimed that the only evidence Plaintiff can offer in support of his claims is (i) he is a member of the protected age group, and (ii) some of Plaintiff's former duties were assumed by a younger employee after his position was eliminated. Thus, Defendant asserted that Plaintiff cannot establish the four elements of a prima facie case of age discrimination as set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

Defendant argued that even assuming that Plaintiff can establish a prima facie case, Plaintiff will still not be able to demonstrate that Defendant's articulated business reason for the

reduction-in-force was a mere pretext for age discrimination.

Plaintiff asserted that he is allowed to prove, through the use of circumstantial evidence, that he was treated less favorably than younger employees during the reduction-in-force, thus proving age discrimination. Plaintiff alleged that a subordinate performed some of Plaintiff's duties after his discharge.

As to the failure to hire claim, Plaintiff asserted that the individual who hired the younger employee, did so without talking to Plaintiff personally, without looking at Plaintiff's personnel file and without knowledge that Plaintiff had been Controller for the entire company for six years. Thus, Plaintiff claimed he was not truly "considered" for the position.

Defendant Memorex Telex filed its Motion for Summary Judgment on all of Plaintiff's claims. This Court, by Order entered July 29, 1993, granted in part and denied in part such motion. As to the ADEA claim relating to Defendant's reduction-in-force action and the claim of an implied employment contract, Defendant's Motion for Summary Judgment was granted. As to Plaintiff's ADEA claim for failure to hire and Plaintiff's Burk tort claim for alleged violations of Oklahoma Public Policy, the Motion for Summary Judgment was denied.

Defendant's Motion in Limine:

Defendant has filed a motion in limine to exclude opinion testimony on Plaintiff's qualifications.[2] Specifically Defendant

[2] Defendant argues that Plaintiff plans to offer twelve witnesses all of whom will testify as to Plaintiff's qualifications.

seeks to prohibit Plaintiff from introducing testimony at trial relating to certain opinion testimony regarding Plaintiff's qualifications. Defendant argues that such opinion evidence, concerning the belief of Plaintiff and his associates that Plaintiff was "more qualified" (i) to perform the duties of Financial Analyst and (ii) for the position of Controller for the new Southern/South Central Regions, is not relevant to this case because Defendant has not challenged Plaintiff's qualifications and in fact admits to same. The issue as to Plaintiff's qualifications to perform the duties of Financial Analyst is now moot in view of the Court's ruling on summary judgment, subject to the Court's comments below.

Prior to the Court's ruling on summary judgment, Plaintiff had argued that under McDonnell Douglas, *supra*, and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), a plaintiff is allowed to prove, in a reduction-in-force case, his claim by indirect evidence as well as direct evidence and that when a prima facie case is established the burden shifts to the defendant to articulate a lawful reason for the employment discharge. Plaintiff further averred that one of the prima facie elements in a discharge case is that the employee was performing his job well enough to meet his employer's legitimate expectations. Branson v. Price River Coal Co., 853 F.2d 768, 771, (10th Cir.1988); Duffy v. Wheeling Pittsburg Steel Corp., 738 F.2d 1393, 1395 (3rd Cir.1984); Oxman v. WLS-TV, 846 F.2d 448, 452-455, (7th Cir. 1988). This issue is now moot as to the ADEA

claim but the Court concludes the overriding principles as to job qualifications could materially impact the Burk claim herein.

Plaintiff further argues that one of the prima facie elements in a failure-to-hire case is that the plaintiff is qualified to perform the position for which he applied, citing Burdine, *supra*, and Hazen Paper Co. v. Biggen, U.S. 61 FEP Cases 793 (4/20/93).

The Court concludes Defendant's Motion in Limine, as to any witnesses relating to Plaintiff's qualifications, should be and the same is hereby DENIED. However, Plaintiff can, in the Court's view, prove such qualifications and fitness in less than twelve witnesses and Plaintiff will be limited to not over four witnesses on this issue.

Further, Defendant seeks to exclude any opinion testimony concerning the alleged disparate impact of Defendant's reductions-in-force on "older" employees. Defendant contends this testimony as to a "policy" or "plan" by Defendant Memorex Telex to eliminate employees of the former Telex Corporation, which allegedly has the practical result of eliminating "older" employees of the merged companies, is pure conjecture and fails to cross any threshold of reliability, citing Ortega v. Safeway Stores, Inc., 943 F.2d 1230, 1242 (10th Cir.1991). Again, the Court concludes this issue is moot as to the ADEA reduction-in-force claim but may have material impact upon Plaintiff's Burk claim.

Plaintiff, essentially, fails to respond to this issue. Notwithstanding, the Court concludes a plaintiff should not suffer advance preclusion of circumstantial evidence of age

discrimination, subject always to a relevancy test. The Court will deny Defendant's Motion in Limine on this point at this time. If Plaintiff's witnesses on this issue maintain relevance at trial and offer significant evidence of age discrimination based upon an alleged "policy" or "plan" of Defendant Memorex-Telex Corporation to eliminate the Telex employees who were "generally older", such will be allowed. However, the Court will not allow such testimony if not factually based.

Lastly, Defendant asks the Court to preclude any reference to an enhanced severance package which was offered to a limited class of employees who were discharged after Plaintiff, noting that Plaintiff does not contend he was discriminated against because he did not receive these benefits. Again, Plaintiff has failed to respond to such argument.

The Court is at a loss, at this time, to grasp the evidential significance of enhanced severance packages offered to Defendant's employees after Plaintiff's discharge as it relates to any of Plaintiff's claims. The Court concludes Defendant's Motion, as to this issue, should be and the same is GRANTED.

In summary, the Court GRANTS Defendant's Motion in Limine (docket #53) as to any testimony regarding enhanced severance packages offered to Defendant's employees after Plaintiff's discharge, and DENIES Defendant's Motion in Limine as to the remaining matters as discussed above.

Defendant filed, on August 25, 1993, a Supplemental Motion In Limine (docket # 68) which relates to none of the above. In

Defendant's latest filing, it objects to a proposed instruction (No. 3) offered by Plaintiff which instruction states that plaintiff "seeks damages for any physical or mental distress or anguish plaintiff has suffered as a result of the failure to hire". Defendant further objects to Plaintiff's proposed instruction No. 29 which addresses the damages to be assessed ("any physical or mental distress that plaintiff suffered as a result of the failure to hire") by the jury in the event that they find in favor of Plaintiff on the issue of liability.

Defendant argues that these proposed instructions present for the first time a damage claim based on alleged physical or mental distress and that no such claim was set forth in Plaintiff's Complaint or Amended Complaint. Further, Defendant argues that, during the course of discovery, Plaintiff never identified this as an element of his damages although specifically asked in interrogatories and deposition.

The Court concludes Defendant's Supplemental Motion In Limine (#68), on the issue of evidence relating to Plaintiff's physical or mental distress claims, should be and the same is hereby GRANTED.

IT IS SO ORDERED THIS 7th DAY OF SEPTEMBER, 1993

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

AO 450 (Rev. 5/85) Judgment in a Civil Case ⊕

United States District Court

NORTHERN DISTRICT OF OKLAHOMA

WALTER RANDALL DIETZEL and
LYNN DIETZEL,
Plaintiffs,

V.

GILBERT WOODRUFF,
Defendant

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 92-C-536-B

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Judgment is entered in favor of defendant Gilbert Woodruff and against the plaintiffs Walter Randall Dietzel and Lynn Dietzel. Costs of action are assessed in favor of the defendant, if timely applied for pursuant to Local Rule 6(E) and parties are to pay their own respective attorney fees.

Sept. 7, 1993
Date

Thomas R. Brett
~~Clerk~~ U S District Judge
Thomas R Brett

(By) Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	CASE NO. 93-C-649-B
KENNY F. MOORE, Defendant.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for a hearing on the Motion for Preliminary Injunction filed by the plaintiff, United States of America, on August 27, 1993 at 3:30 p.m.. Present for the plaintiff United States was Charles P. Hurley, Esq. of the Tax Division of the U.S. Department of Justice. Defendant, Kenny F. Moore, despite having been given prior notice of the hearing, and despite having been served with a subpeona requiring his attendance, failed to appear.

At the conclusion of the hearing, upon the oral motion of the United States and for good cause shown, trial of the merits of this matter was advanced and consolidated with the hearing on the Motion for a Preliminary Injunction, pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure.

Upon the evidence presented, the Court hereby makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Service in this matter is proper for the purpose of proceeding with the hearing on the United States' Motion for Preliminary Injunction and for trial on the merits.

2. As reflected by Exhibits 2 and 3, a UCC financing statement with an attached "UCC-4 Non-Negotiable 'True Bill' Private Agreement," was filed, on or about April 20, 1993, by the defendant with the Tulsa County Clerk against the assets of Kyle Dameron, an employee of the Internal Revenue Service.

3. As reflected by Exhibits 7 and 8, a UCC financing statement with an attached "UCC-4 Non-Negotiable 'True Bill' Private Agreement," was filed, on or about May 4, 1993, by the defendant with the Wagoner County Clerk against the assets of Jeff Crook and his wife Tina Crook. Jeff Crook is an employee of the Internal Revenue Service.

4. The "UCC-4 Non-Negotiable 'True Bill' Private Agreements," which were not signed by Kyle Dameron, Jeff Crook or Tina Crook, purport to be acknowledgements by the individuals named that such individuals had caused damages to defendant Kenny F. Moore in the amount of $7 million by seizing the defendant's real and personal property. The alleged agreements, copies of which were sent to the named individuals by mail, purport to be effective ten days after "presentment" thereof if no answer is made thereto.

5. The defendant has federal income tax liabilities that have been outstanding for as long as six years. The IRS has properly sought to collect the outstanding federal income tax liabilities by means provided under the Internal Revenue Code (26 U.S.C.).

6. Kyle Dameron and Jeff Crook, as part of their official duties for the IRS, have contacted defendant in efforts to collect his unpaid federal tax liabilities and to secure delinquent tax returns from him. Kyle Dameron and Jeff Crook have had no other contact of any nature with defendant.

7. Exhibits 2, 3, 7 and 8 were filed by the defendant in an attempt to intimidate and harass the IRS and particularly, Kyle Dameron and Jeff Crook, the two employees of the IRS named in such exhibits ("collectively, the "IRS employees").

8. There is no justifiable basis, factual or legal, for the filing of Exhibits 2, 3, 7 and 8 by the defendant. The filing of such documents was vexatious and solely for the purpose of intimidation and harassment of the IRS and its employees and agents.

9. Exhibits 5, 6 and 9, which include documents captioned "Citizen's Warrant for Citizens Arrest," were sent by the defendant through the United States mail system by defendant to Kyle Dameron and Jeff Crook.

10. There is no justifiable basis, factual or legal, for the sending of Exhibits 5, 6 and 9 by the defendant. The filing of such documents was vexatious and solely for the purpose of intimidation and harassment of the IRS and its employees and agents.

11. Exhibit 10 is a flyer the defendant caused to be delivered to bidders at the public auction of the defendant's assets held by the IRS.

12. There is no justifiable basis, factual or legal, for the delivery of Exhibit 10 by the defendant in the manner described above. The delivery of such documents was vexatious and solely for the purpose of interfering with the lawful collection of unpaid taxes by the IRS and its employees and agents.

13. The IRS employees named in Exhibits 2, 3, 7 and 8 are suffering irreparable injury as a result of the continuation of these liens filed of record in Tulsa County and Wagoner County, which would potentially be liens against their property and property rights.

14. The United States is suffering irreparable harm as a result of the defendant's use of Exhibits 2, 3, 4, 5, 6, 7, 8, 9 and 10 by reason of the fact that such documents interfere with the efficient enforcement of the internal revenue laws.

15. A balancing of the equities in this matter insofar as any injunction, either preliminary or permanent, being entered, establishes that substantial harm would fall on the United States and the individual IRS employees unless the defendant is enjoined from filing similar documents in the future. On the other hand, because the UCC liens and other documents described above are without justification in fact or law, the defendant will not be harmed by the granting of an injunction.

16. It is in the interest of the public that the Internal Revenue Code be properly enforced and that the employees of the IRS be permitted to carry on their proper and lawful work without

frivolous and vexatious purported liens being filed against or served upon them.

CONCLUSIONS OF LAW

17. Section 7402(a) of the Internal Revenue Code (26 U.S.C.) specifically authorizes district courts to issue injunctions "as may be necessary and appropriate for the enforcement of the internal revenue laws." Courts have repeatedly held that the language of Section 7402(a) is broad and clearly manifests "a Congressional intention to provide the district courts with a full arsenal of powers to compel compliance with the internal revenue laws." Body v. United States, 243 F. d 378, 384 (1st Cir. 1957). See also, United States v. First National City Bank, 568 F.2d 853 (2nd Cir. 1977).

18. In United States v. Ernst & Whinney, 735 F.2d 1296, 1300 (11th Cir. 1984), the court noted that Section 7402(a) "has been used to enjoin interference with tax enforcement even when such interference does not violate any particular tax statute." Courts have used Section 7402(a) on numerous occasions to grant the exact relief sought here, i.e., to enjoin taxpayers from filing frivolous liens against IRS employees. See United States v. Ekblad, 732 F.2d 562 (7th Cir. 1984); United States v. Hart, 701 F.2d 749 (8th Cir. 1983); and United States v. Van Dyke, 568 F. Supp. 820 (D. Or. 1983).

19. The Tenth Circuit has held that for an injunction to issue:

> The moving party must establish: (1) substantial likelihood that the movant will eventually prevail on the merits; (2) a showing that the movant will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) a showing that the injunction, if issued, would not be adverse to the public interest.

SCFC ILC, Inc. Visa USA, Inc., 936 F.2d 1096, 1098 (10th Cir. 1991); Otero Savings & Loan Ass'n, 665 F.2d at 278.1/

20. In the present case, the United States has met each of the above four elements, thus entitling it to the issuance of a preliminary injunction and a permanent injunction.

21. The IRS has been specifically authorized by Congress to collect outstanding tax liabilities by means of a levy. 26 U.S.C. § 6331.2/ In Phillips v. Commissioner, 283 U.S. 589,

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1/It has been held that where "an injunction is expressly authorized by statute ... and the statutory conditions are satisfied, the movant is not required to establish irreparable injury before obtaining injunctive relief." Duke v. Uniroyal, Inc., 777 F. Supp. 428, 433 (E.D.N.C. 1991). See also, United States v. Focht, 694 F. Supp. 1199, 1201 (W.D. Pa. 1988) ("Congress itself has balanced the equities and determined that a violation of the statute is itself sufficient public injury to justify issuance of an injunction") rev'd on other grounds 882 F. 2d 55 (3rd Cir. 1989). Accordingly, in the present case, the United States is only required to show that the actions of the defendant has interfered with the enforcement of the internal revenue laws, which is clearly the case here. See § 7402(a). However, as set forth herein, the United States can meet the burden under the more traditional test for injunctive relief. Thus, regardless of the standard applied by the Court, the United States is entitled to the relief sought.

2/Section 6331 provides in pertinent part that "[i]f any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property ... belonging to such person...."

595 (1931), the Supreme Court held that "[t]he right of the United States to collect its internal revenue by summary administrative proceedings has long been settled. Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained". Accord Commissioner v. Shapiro, 424 U.S. 614 (1976). Thus, the levies made upon defendant's assets are specifically authorized by law and the defendant's claim of damage is without merit.

22. There is no basis in law for the defendant to recover damages against the IRS employees. See Davis v. Reed, 462 F. Supp. 410, 412 (W.D. OK 1977) ("As a general rule Federal officials are not personally liable for their actions").

23. Section 2006 of Title 28, United States Code, provides that:

> Execution shall not issue against a collector or other revenue officer on a final judgment in any proceeding against him for any of his acts, or for the recovery of any money exacted by or paid to him and subsequently paid into the Treasury, in performing his official duties, if the court certifies that:
>
> (1) probable cause existed; or
>
> (2) the officer acted under the directions of the Secretary of the Treasury or other proper Government officer.
>
> When such certificate has been issued, the amount of the judgment shall be paid out of the proper appropriation by the Treasury.

24. Under Oklahoma law, the "UCC-4 Non-Negotiable 'True Bill' Private Agreement" is not valid. Oklahoma law provides

that a lien can be created only by contract or by operation of law. Okla. Stat. tit. 42, § 6. See also, Phoenix Mutual Life Ins. Co. v. Harden, 596 P. 2d 888, 890 (OK 1979) ("Although lien laws will be liberally construed, courts cannot create a lien neither provided for by law nor created by contract").

25. In the present case, the evidence established that the only contact between the IRS employees and the defendant involved the IRS' attempts to collect the defendant's unpaid federal income tax liabilities and to secure delinquent federal income tax returns. There was no evidence of any contractual relationship of any type.

26. The defendant failed to establish the existence of any provision of law authorizing the type of lien the defendant has filed against the IRS employees.

27. Numerous courts have held that the potential impact of taxpayers filing frivolous liens against Internal Revenue Service agents constituted irreparable harm for purposes of injunctive relief. See, e.g., Van Dyke, 568 F. Supp. at 822 ("I also find that the actions of Van Dyke and Randolph, in filing these lawsuits and documents, impose irreparable harm upon the employees of the federal government with whom these tax protesters quarrel. Titles to real estate have been clouded, banks have been the subject of frivolous attempts at 'garnishment,' and in general the employees of the federal government have been harassed in their personal lives for doing their jobs"); United States v. Kaun, 633 F. Supp. 406, 418 (E.D.

Wis. 1986) ("[defendant] and his followers continue to seek to frustrate the administration and enforcement of the federal tax laws -- all to the great irreparable harm of the Internal Revenue Service and the public it serves"); United States v. Landsberger, 534 F. Supp. 142, 145 (D. Minn. 1981).

28. Exhibits 2, 3, 4, 5, 6, 7, 8 and 9 are invalid and null and void.

29. The defendant and, pursuant to Rule 65(d) of the Federal Rules of Civil Procedure, his officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, are permanently enjoined from filing any additional liens of any nature or similar documents with the Tulsa County and Wagoner County Clerk's office or any state authority or from filing any other frivolous or vexatious pleadings or other documents of any nature whose purpose is to frustrate and intimidate the Internal Revenue Service or its employees in carrying out their lawful activities.

30. The defendant is and, pursuant to Rule 65(d) of the Federal Rules of Civil Procedure, his officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, are permanently enjoined from using the United States mails to send any documents intended to interfere with or otherwise hinder the effective enforcement of the internal revenue laws of the United States.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

CHARLES P. HURLEY
Trial Attorney
Tax Division
U.S. Department of Justice
P.O. Box 7238
Ben Franklin Station
Washington, D.C. 20044
(202) 514-6498

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO. 93-C-649-B
	)	
KENNY F. MOORE,	)	
	)	
Defendant.	)	

JUDGMENT

Pursuant to the Findings of Fact and Conclusions of Law entered of even date herewith, and pursuant to Rule 58 of the Federal Rules of Civil Procedure, it is hereby

ORDERED, ADJUDGED and DECREED that Judgment be entered in favor of the plaintiff United States of America and against defendant Kenny F. Moore as follows:

1. The UCC financing statements and "UCC-4 Non-Negotiable 'True Bill' Private Agreements" filed by defendant, Kenny F. Moore, against Kyle Dameron and Jeff Crook and Tina Crook are declared to be invalid and null and void.

2. The defendant, Kenny F. Moore, and, pursuant to Rule 65(d) of the Federal Rules of Civil Procedure, his officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, are permanently enjoined from filing any additional liens of any nature or similar documents with the Tulsa County and Wagoner County Clerk's office or any state authority or from filing any other frivolous or vexatious pleadings or other documents of any

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nature whose purpose is to frustrate and intimidate the Internal Revenue Service or its employees in carrying out their lawful activities.

3. The defendant, Kenny F. Moore, is and, pursuant to Rule 65(d) of the Federal Rules of Civil Procedure, his officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, are permanently enjoined from using the United States mails to send any documents intended to interfere with or otherwise hinder the effective enforcement of the internal revenue laws of the United States.

4. All costs of this action are assessed against defendant, Kenny F. Moore, if timely applied for pursuant to Local Rule 6.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

CHARLES P. HURLEY
Trial Attorney
Tax Division
U.S. Department of Justice
P.O. Box 7238
Ben Franklin Station
Washington, D.C. 20044
(202) 514-6498

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HARRY ROBINSON, et al.,

Plaintiffs,

vs.

AUDI AKTIENGESELLSCHAFT, et al.,

Defendants.

No. 93-C-402-E

ADMINISTRATIVE CLOSING ORDER

IT IS HEREBY ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within thirty (30) days that further litigation is necessary.

ORDERED this 7th day of September, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ERNESTINE HARRISON, for Beatrice and Bronze Harrison,

Plaintiff,

vs.

SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

No. 91-C-606-E

ORDER

The Court has before it for consideration Defendant's objections to the Findings and Recommendations of the Magistrate filed on March 16, 1993 in which it is recommended that the decision of the Appeals Counsel be reversed, in order that the judgment of the administrative law judge be reinstated, and the insurance benefits of Bronze and Beatrice be restored to $224.50 per month.

After careful consideration of the matters presented to it, the Court has concluded that the Findings and Recommendations of the Magistrate should be and hereby are affirmed.

IT IS THEREFORE ORDERED that judgment in favor of Plaintiff be entered such that the insurance benefits of Bronze and Beatrice are to be restored, as determined by the administrative law judge.

ORDERED this 7TH day of September, 1993.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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ENTERED ON DOCKET

DATE 9-8-93

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
SEP 7 1993
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

McFARLAND DISTRIBUTORS, INC.,)
)
Plaintiff,)
)
vs.) No. 90-C-1017-E
)
LOUIS REX CURTIS,)
)
Defendant.)

JOURNAL ENTRY OF JUDGMENT AND ORDER OF DISMISSAL

The respective motions of the parties for a Journal Entry of Judgment (docket #72 and #73) are granted. The Findings of Fact and Conclusions of Law of this Court, entered May 11, 1993 (docket #74) are incorporated herein by reference. This case is dismissed.

ORDERED this 3rd day of September, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LAWRENCE HALLFORD,

Plaintiff,

vs.

LOUIS W. SULLIVAN, M.D., SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

No. 91-C-141-E

FINAL ORDER AND ORDER OF DISMISSAL

Plaintiff's Motion for Final Order (docket #14) is granted. This Court's Orders of February 26, 1993 (docket #13), and August 2, 1993 (docket #s 20, 21) are incorporated herein by reference. This case is dismissed. All pending motions are moot.

ORDERED this 3rd day of September, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

22

ENTERED ON DOCKET

DATE 9-8-93

FILED

SEP 7 1993

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE: OTASCO, INC. Employer Tax I.D. #13-2855286, Debtor,	Case No. 88-03410-W (Ch. 11)
OTASCO, INC., a Nevada corporation, Plaintiff and Appellee,	Adversary No. 89-0163-W
v.	Dist Ct. No. 89-C-832-E
THE MOHAWK RUBBER COMPANY, an Ohio corporation, Defendant, Counter-Claimant, Third-Party Claimant and Appellant,	Appeal Nos. 92-5125 92-5139
v.	
AMERITRUST COMPANY NATIONAL ASSOCIATION, a national bank, Third-party Defendant and Appellee,	

O R D E R

Pursuant to the mandate of the Tenth Circuit remanding the case to this Court for reconsideration of the Motion of Mohawk Rubber Company for Rehearing, the Court has reviewed the record and the applicable authorities. The Court is of the opinion that no grounds exist for vacating, or amending its prior Order on the collateral estoppel issue; wherefor Mohawk's original motion is denied; Mohawk's Application (docket #35) and Request (docket #37) are granted. This Court's May 12, 1992, Order will stand.

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ORDERED this 3rd day of September, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PHILLIP E. HARRISON,

Plaintiff,

vs.

SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

No. 91-C-460-E

O R D E R

The Court has before it for consideration Plaintiff Phillip E. Harrison's objections to the Findings and Recommendations of the Magistrate filed on December 9, 1992 in which it is recommended that Plaintiff's claim for benefits under the Social Security Act be denied and that judgment be entered for the Defendant.

After careful consideration of the matters presented to it, the Court has concluded that the Findings and Recommendations of the Magistrate should be and hereby are affirmed.

IT IS THEREFORE ORDERED that Plaintiff is not entitled to disability benefits under the Social Security Act and that judgment be and hereby is entered for the Defendant.

ORDERED this 7th day of September, 1993.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

25

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GEORGE WASHINGTON, JR.,

Plaintiff,

vs.

LOUIS W. SULLIVAN, M.D., SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

No. 91-C-452-E

FINAL ORDER AND JUDGMENT

The Court has for consideration the Report and Recommendation of the Magistrate affirming the decision of the Secretary (docket #25). The Court has reviewed the record in light of the applicable law, and, finding that the Secretary did not reopen the case for the period November 26, 1985 through October 28, 1987 and that the Secretary's finding of non-disability for the period of October 28, 1987 and that the Secretary's finding of non-disability for the period of October 28, 1987 through May 25, 1990 is supported by substantial evidence, concludes that the Magistrate's Report and Recommendation should be affirmed.

IT IS THEREFORE ORDERED that the case is hereby dismissed.

ORDERED this 7th day of September, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Hardy Northcross, SSN: 442-36-9774,	)	
Plaintiff,	)	
vs.	)	Case No. 91-C-185-E
Donna E. Shalala, Secretary of Health and Human Services,	)	
Defendant.	)	

ORDER

The Plaintiff, under 42 U.S.C. Section 406, has filed an application for attorney fees, and the Secretary, Defendant, states that he has no objection to the requested attorney fee in the amount of $5,000.00. On July 27, 1992, this Court had ordered that an Equal Access to Justice Fee, under Section 28 U.S.C.S. Section 2412(b), in the amount of $3,569.85 should be awarded to the Plaintiff. It is therefore ordered that Plaintiff's counsel be awarded fees under 42 U.S.C. Section 406 in the amount of $5,000.00.

Because counsel for Plaintiff has been approved an award under 28 U.S.C.S. Section 2412(b), as well as 42 U.S.C.S. Section 406, he shall pay the smaller amount to the Plaintiff. Lopez v. Sullivan, 882 F.2d 1533 (10th Cir., 1989) and Weakley v. Bowen, 803 F.2d 575 (10th Cir., 1986)

IT IS SO ORDERED this _____ day of ____, 1993.

S/ JAMES O. ELLISON

United States District Judge

Mark E. Buchner, OBA #1279
Attorney for Plaintiff
3726 South Peoria
Suite 26
Tulsa, Oklahoma 74105-3266

and

Peter Bernhardt, OBA #741
Assistant U.S. Attorney
Northern District of Oklahoma
3600 U.S. Courthouse
Tulsa, Oklahoma 74103

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

Hardy Northcross, SSN: 442-36-9774, Plaintiff, vs. Donna E. Shalala, Secretary of Health and Human Services, Defendant.	)	Case No. 91-C-185-E

ORDER

The Plaintiff, under 42 U.S.C. Section 406, has filed an application for attorney fees, and the Secretary, Defendant, states that he has no objection to the requested attorney fee in the amount of $5,000.00. On July 27, 1992, this Court had ordered that an Equal Access to Justice Fee, under Section 28 U.S.C.S. Section 2412(b), in the amount of $3,569.85 should be awarded to the Plaintiff. It is therefore ordered that Plaintiff's counsel be awarded fees under 42 U.S.C. Section 406 in the amount of $5,000.00.

Because counsel for Plaintiff has been approved an award under 28 U.S.C.S. Section 2412(b), as well as 42 U.S.C.S. Section 406, he shall pay the smaller amount to the Plaintiff. Lopez v. Sullivan, 882 F.2d 1533 (10th Cir., 1989) and Weakley v. Bowen, 803 F.2d 575 (10th Cir., 1986)

IT IS SO ORDERED this _____ day of ____, 1993.

BY JAMES O. ELLISON

United States District Judge

Mark E. Buchner, OBA #1279
Attorney for Plaintiff
3726 South Peoria
Suite 26
Tulsa, Oklahoma 74105-3266

and

Peter Bernhardt, OBA #741
Assistant U.S. Attorney
Northern District of Oklahoma
3600 U.S. Courthouse
Tulsa, Oklahoma 74103

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHARLES HENDRIX, SSN: 446-32-1833 Plaintiff, vs. DONNA E. SHALALA, Secretary of Health and Human Services, Defendant.	)	Case No. 92-C-408-E

O R D E R

Upon the motion of the Plaintiff, to which there is no objection, it is hereby ORDERED that Plaintiff be granted sixty (60) days from receipt of the final "Award Certificate" in the case to file for attorney fees under 42 U.S.C Section 406.

IT IS SO ORDERED this 7 day of Sept, 1993.

/s/ JAMES O. ELLISON

United States Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LARRY W. DUNN,

Plaintiff,

vs.

LOUIS W. SULLIVAN, M.D., SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

No. 91-C-717-E

O R D E R

Plaintiff's Motion to Vacate and Reconsider this Court's Order filed October 19, 1992 is granted (docket #14). Plaintiff's inadvertence in failing to file an objection to the Magistrate's Report and Recommendation is duly noted. Plaintiff's objection must be filed on or before the 21st day of September, 1993.

ORDERED this 7th day of September, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SHERILYN M. YOUNGER, on behalf of Kia R. and Tia L. Younger,

Plaintiff,

vs.

LOUIS W. SULLIVAN, M.D., SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

No. 91-C-784-E

O R D E R

The Court hereby affirms the Report and Recommendation of the Magistrate that the Secretary's decision denying benefits be affirmed. The Court specifically finds that the Secretary complied with the requirements of Dixon v. Heckler, 811 F.2d 506 (10th Cir. 1987) in developing the case relative to the putative father, and that the Secretary's decision is supported by substantial evidence on the record.

ORDERED this 7TH day of September, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARY ELIZABETH PEVEY,

Plaintiff,

vs.

AARON RENTS, INC., a Georgia corporation,

Defendant.

CIVIL ACTION

FILE NO. 93-C-0068E

STIPULATION OF DISMISSAL WITH PREJUDICE

The undersigned, counsel for the parties to this action, hereby stipulate pursuant to Rule 41(a) of the Federal Rules of Civil Procedure to the dismissal of this action with prejudice and stipulate that no costs, expenses, or attorneys' fees shall be assessed against either party.

This 3RD day of SEPTEMBER, 1993.

KILPATRICK & CODY

By: Thomas H. Christopher
Thomas H. Christopher
1100 Peachtree Street
Suite 2800
Atlanta, Georgia 30309-4530
(404) 815-6500

NICHOLS, WOLFE, STAMPER, NALLY & FALLIS, INC.

By: Frank B. Wolfe III
Frank B. Wolfe, III, Esq.
OBN 9825
Old City Hall Building
Suite 400
124 East Fourth Street
Tulsa, Oklahoma 74103
(918) 584-5182

Attorneys for Defendant

[Signatures continued on next page.]

By: Ralph Simon

Ralph Simon
OBN 8254

5700 E. 61st Street
Suite 101
Tulsa, Oklahoma 74136-2700
(918) 496-8008

Attorney for Plaintiff

IT IS SO ORDERED this ____ day of _____, 1993.

/s/ JAMES O. ELLISON

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HELEN ISRAEL,

Plaintiff,

vs.

AVIS RENT-A-CAR SYSTEM, INC.,

Defendant,

vs.

MID-CONTINENT CASUALTY COMPANY,

Intervenor.

No. 92-C-446-B

J U D G M E N T

Pursuant to the Jury's Verdict accepted and filed of record on the 2nd day of September, 1993, Judgment is hereby entered in favor of Defendant, Avis Rent-A-Car, and against Plaintiff, Helen Israel. Costs are assessed against Plaintiff if timely applied for under Local Rule 6, with each party to pay their own respective attorneys fees.

DATED this 2nd day of September, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

EDWARD T. McHAM,

Plaintiff,

vs.

SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

No. 91-C-694-E

O R D E R

The Court has before it for consideration the Defendant's objections to the Findings and Recommendations of the Magistrate filed on 91-C-694-E in which it is recommended that this matter be remanded to the administrative law judge for purposes of determining the "date of onset" pursuant to the guidelines set forth in Social Security Rule 83-20.

After careful consideration of the matters presented to it, the Court has concluded that the Findings and Recommendations of the Magistrate should be and hereby are affirmed.

IT IS THEREFORE ORDERED that this matter is hereby remanded to the administrative law judge for the sole purpose of determining the date of onset giving consideration to the guidelines set forth at Social Security Rule 83-20.

ORDERED this 7th day of September, 1993.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KAREN SIMPSON, on behalf of Plaintiff, ADRIEL C.L. SIMPSON, pro se,

Plaintiff,

V.

COLEEN HOGAN, et al.,

Defendants.

No. 92-C-673-E

O R D E R

The Court has before it for consideration Defendant's Motion for Summary Judgment. Summary judgment is authorized if the movant establishes that there is no genuine dispute about any material fact and that as a matter of law he is entitled to judgment. Fed. R. Civ. P. 56(c). Summary judgment cannot be awarded when there exists a genuine issue as to a material fact. Adickes v. Kress, 90 S.Ct. 1598 (1970). In Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986), the Supreme Court Stated that "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden at trial." Id. at 322, 106 S.Ct. at 2552. The moving party, of course, must shoulder "the initial responsibility of informing the district court of the basis of its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with

affidavits, if any which [it] believes demonstrate the absence of a genuine issue of fact." Id. at 323, 106 S.Ct. at 2553.

Plaintiff was convicted of First Degree Murder and sentenced to life imprisonment. Plaintiff filed a 42 U.S.C. §1983 action in forma pauperis claiming his fourth, fifth, sixth and eighth amendment rights were violated throughout the police investigation and prosecution of the crime for which he was convicted by a jury. Plaintiff specifically challenges the police interrogation and searches of his residence.

Under res judicata or claim preclusion, a final judgment on the merits precludes Plaintiff from relitigating issues that were or could have been raised in that action. Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981). The Court finds the record clearly demonstrates Plaintiff was afforded a full and fair opportunity to raise these issues in the state proceedings. See Hubbert v. City of Moore, 923 F.2d 769 (10th Cir. 1991).

In addition, the Court finds Plaintiff's specific allegations regarding the two separate searches of the dwelling in which he resided and the interrogation conducted by officers Hogan and Parke are not supported by the evidence. With respect to the police searches, the Court finds the initial search on June 29, 1990, was pursuant to a search waiver executed by Plaintiff's mother with whom Plaintiff lived; the subsequent search of said residence was pursuant to a valid search warrant issued on August 1, 1990. Further, Plaintiff's argument that the evidence found was "planted"

by a "third party" is unpersuasive.

Similarly, Plaintiff's allegation that he was harassed, intimidated, threatened and coerced during his interrogation is without merit. The record establishes that, at the time of the interview, officers Hogan and Parke questioned Plaintiff as a witness to the murder and not as a suspect. A review of the recorded tape interview conducted by the officers Hogan and Parke clearly shows Plaintiff was properly treated within the bounds of the law. Consequently, Plaintiff's allegations concerning the interview process must fail.

IT IS THEREFORE ORDERED that Defendant's Motion for Summary Judgment is hereby **GRANTED**; Plaintiff's complaint in its entirety is hereby **DISMISSED** with prejudice.

SO ORDERED on the 2nd day of September, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

9-7-93

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CHRISTIN WORKMAN, et al.,

Plaintiffs,

vs.) Case No. 92-C-826-E

TRANSITIONAL LIVING, INC., et al.,

Defendants.

JUDGMENT

Now on this 2 day of September, 1993, comes on before me, the undersigned United States District Judge, the above-styled and numbered cause. The Court finds that the Defendants Cleveland have taken bankruptcy and that the cause of action of Plaintiffs as against them should be dismissed without prejudice. The Court further finds that the Defendant State of Oklahoma has been dismissed from this action by virtue of this Court's Order of June 14, 1993. The Court further finds that Defendant Transitional Living, Inc., is in default and that judgment should be granted against it and in favor of Plaintiffs as prayed for in the Complaint, Amended Complaint, Consent of Additional Plaintiffs to Joinder in Action, and Second Consent of Additional Plaintiffs to Joinder in Action. By virtue of the Dismissal heretofore entered and this judgment, all claims as among all parties are disposed of.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the claims of Plaintiff as against Defendants Cleveland be and same are hereby dismissed without prejudice to any future action.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that each Plaintiff below named recover of Defendant Transitional Living,

Inc., the amount set forth below for each such Plaintiff, with interest thereon at the rate of 3.43% per annum, as provided by law, and the costs of this action:

Christin Workman	$5,000;
Angela White	$8,890;
Glenna Burns	$8,890;
Vicki Robbins-Lisle	$8,000;
T.J. Bateman	$12,460;
Wanda Whiteside	$8,290;
Marva Y. Lee	$8,290;
Robert S. McBee, Jr.	$6,000;
Dorothy Joubert	$6,450;
Diana Stout	$1,052;
Yvonne Hicks	$4,080;
Denise A. Smith	$8,280;
Dorreen Pritchett	$5,000;
Joie Ratliff	$3,800;
Patricia Smith	$10,800.

For all of which let execution issue.

S/ JAMES O. ELLISON

JAMES O. ELLISION
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 9-7-93

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JUDI E. GROVE AND ROBERT L. GROVE, as Parents and Next Friends of JOSHUA E. GROVE, a Minor,	)	
Plaintiff,	)	
vs.	)	Case No. 93-C-0176-E
MICHAEL JOHN RICHARDSON; CORPORATION OF PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS AND PREFERRED RISK MUTUAL INSURANCE COMPANY,	)	
Defendants.	)	

FILED

SEP 3 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE AS TO DEFENDANT PREFERRED RISK MUTUAL INSURANCE COMPANY

Come now the Plaintiff and Defendant, Preferred Risk Mutual Insurance Company ("Preferred Risk"), by and through their respective attorneys, pursuant to Federal Rule of Civil Procedure 41, and stipulate to the Dismissal With Prejudice of the Defendant, Preferred Risk, from the above captioned case and claims arising out of the occurrence forming the subject matter of the action. Each party shall bear his or its own attorney fees and costs incurred in connection with this action.

Wm. Gregory James, Esq.
900 Oneok Plaza
100 West Fifth Street
Tulsa, Oklahoma 74103
ATTORNEY FOR PLAINTIFF

David Scott, Esq.
Post Office Box 2619
Tulsa, Oklahoma 74101-2619
ATTORNEY FOR DEFENDANT, PREFERRED RISK MUTUAL INSURANCE COMPANY

CERTIFICATE OF MAILING

I, Wm. Gregory James, hereby certify that a true and correct copy of the above and foregoing instrument was deposited in the U.S. Mails, postage fully prepaid thereon on this _____ day of August, 1993, to:

Stephen C. Wilkerson, Esq.
Post Office Box 1560
Tulsa, Oklahoma 74101-1560

Attorney for Defendants, Michael John Richardson and Corporation of Presiding Bishop of the Church of Jesus Christ of Latter Day Saints

Wm. Gregory James

GARY A. EATON
1717 E. 15th STREET
TULSA, OKLAHOMA 74104
(918) 743-8781

JESS WOMACK
MICHAEL B. SCHWERDTFEGER
ATLANTIC RICHFIELD COMPANY
515 SOUTH FLOWER STREET
45th FLOOR
LOS ANGELES, CALIFORNIA 90071

LARRY G. GUTTERRIDGE
LINDA S. PETERSON
SIDLEY & AUSTIN
555 West Fifth Street, Suite 4000
Los Angeles, California 90013
(213) 896-6000

Attorneys for Plaintiff
ATLANTIC RICHFIELD COMPANY

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OKLAHOMA

ATLANTIC RICHFIELD COMPANY, Plaintiff, -vs- AMERICAN AIRLINES, et al., Defendants.	Case Nos. 89-C-868-B 89-C-869-B 90-C-859-B NOTICE OF DISMISSAL WITHOUT PREJUDICE OF WILLIAM CREEL

Pursuant to Federal Rule of Civil Procedure 41(a)(1), all claims which the Plaintiff Atlantic Richfield Company has filed in

this action against Defendant William Creel are hereby dismissed without prejudice.

Dated: August 31, 1993

GARY A. EATON

ATLANTIC RICHFIELD COMPANY
JESS WOMACK
MICHAEL B. SCHWERDTFEGER

SIDLEY & AUSTIN
LARRY GUTTERRIDGE
LINDA S. PETERSON

By: _____
Gary A. Eaton
Attorneys for Plaintiff
Atlantic Richfield Company

AXA93B54.SEL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GWENDOLYN J. WALKER,

Plaintiff,

vs.

CHARLES ROSE,

Defendant.

No. 93-C-368-E

O R D E R

COMES NOW BEFORE THE COURT FOR CONSIDERATION (1) the motion of Defendant seeking to dismiss this action for failure to state a claim upon which relief can be granted and for insufficiency of process (docket #2), and (2) the motion of Plaintiff for default judgment (docket #3). For the reasons stated herein, Defendants motion is granted, and Plaintiff's motion is denied.

Plaintiff filed her complaint on April 20, 1993 alleging that the Oklahoma Human Rights Commission had violated her civil rights by "ignoring" her complaint against Southwestern Bell and by placing cameras in her home and at her church. Plaintiff never served the complaint on the named Defendants nor any other name mentioned in her complaint. On May 25, 1993, Defendant filed a motion to dismiss, which is at issue here. On June 7, 1993, Plaintiff filed a motion for default judgment alleging Defendant had failed to file a responsive pleading to her complaint within twenty days of the filing of her complaint, as required by Federal Rule of Civil Procedure 12.

We begin by discussing Plaintiff's motion for default

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judgment. Federal Rule of Civil Procedure 12(a) states in pertinent part that "[a] defendant shall serve an answer within 20 days after the service of the summons and complaint upon that defendant,...." Defendant submits that Plaintiff failed to serve the complaint and summons on the chief executive officer of the OHRC, whose official residence is in Oklahoma City, Oklahoma, as required by Federal Rule of Civil Procedure 4(d)(6), as adopted by Oklahoma at 12 O.S. § 2004(C)(1)(c)(5). Instead, Defendant states that Plaintiff mailed a copy of her complaint and the summons to the Tulsa officer of the OHRC. Plaintiff's motion for default judgment is therefore without merit.

We therefore must next address Defendant's motion to dismiss Plaintiff's complaint. Federal Rule of Civil Procedure 8(a) requires a pleading setting forth a claim for relief to contain each of the following: (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, (2) a short and plain statement showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader is seeking. Liberally construing Plaintiff's complaint in her favor, this court finds that the complaint does state grounds upon which the court has jurisdiction (e.g. the Civil Rights Act, 42 U.S.C. § 1983 and the United States Constitution). Moreover, Plaintiff does make a demand for eighteen million dollars as the judgment which she seeks. The issue is whether the complaint contains a "short and plain statement showing that the pleader is entitled to relief." The standard for determining whether dismissal for

failure to so state a claim is warranted is whether plaintiff can prove no set of facts which would entitle her to relief. Conley v. Gibson, 78 S.Ct. 99, 103 (1957). This standard is met by Plaintiff's complaint,[1] and dismissal is warranted.

IT IS THEREFORE ORDERED that Defendant's motion to dismiss is hereby granted, AND Plaintiff's motion for default judgment is hereby denied.

ORDERED this 17 day of September, 1993.

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[1] The complaint states as follows: "To the Federal District Court Clerk of the Northern District of Oklahoma. I, Gwendolyn J. Walker, am sueing [sic] the Oklahoma State Human Rights Commission (Charles Rose) for 18 million dollars for violating my civil rights by "IGNORING" my Complaint against Southwestern Bell and Telephone Company which was filed in their office on June 10, 1992. Charles Rose has intentionally and wilfully mislead me for 10 months. I have had enough of this mess. Who has the power and authority to have a "camera" in my house while they tell the Human Rights Commission (Charles Rose) to ignore me for 10 months, while I set [sic] in Jas Goodwin's office and he's wired 8-17-92, while I set [sic] in Waldo Jones Jr.'s office on March 18, 1993 an [sic] he is wired. And they can tell the pastor of your church to lie.... Rev. Melvin Bailey and put camera's up in the church to monitor your arriving, and class. Is it the FBI or the dishonest Police on the Tulsa Police force who have harassed me with their presents [sic] ever since I file [sic] a grievance against the area manager of security Glenn Eddie Seal's and employee of Southwestern Bell Telephone Company. I have been to acting Police Chief Bigsby on 3-3-92, to the Attorney General's office on 4-8-92, filed a lawsuit against them for IGNORING my plea for help on 1-5-93. And how the Human Rights Commission is intentionally and wilfully misleading me for our 10 months. And now I've got camreras in my house watching me with the onlyman I have dated for the last eleven months, and the only man I've talk [sic] to on the phone for the last eleven months.

Something is terribly wrong here, when anyone's privacy and Civil Rights have been violated to this degree and they are not a threat to society are [sic] another human being. Somethings wrong. And terribly dishonest.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

GARY A. EATON
1717 E. 15th STREET
TULSA, OKLAHOMA 74104
(918) 743-8781

JESS WOMACK
MICHAEL B. SCHWERDTFEGER
ATLANTIC RICHFIELD COMPANY
515 SOUTH FLOWER STREET
45th FLOOR
LOS ANGELES, CALIFORNIA 90071

LARRY G. GUTTERRIDGE
LINDA S. PETERSON
SIDLEY & AUSTIN
555 West Fifth Street, Suite 4000
Los Angeles, California 90013
(213) 896-6000

Attorneys for Plaintiff
ATLANTIC RICHFIELD COMPANY

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OKLAHOMA

ATLANTIC RICHFIELD COMPANY, Plaintiff, -vs- AMERICAN AIRLINES, et al., Defendants.	Case Nos. 89-C-868-B 89-C-869-B 90-C-859-B NOTICE OF DISMISSAL WITHOUT PREJUDICE OF SAM E. FARMER

Pursuant to Federal Rule of Civil Procedure 41(a)(1), all claims which the Plaintiff Atlantic Richfield Company has filed in

this action against Defendant Same E. Farmer are hereby dismissed without prejudice.

Dated: August 31, 1993

GARY A. EATON

ATLANTIC RICHFIELD COMPANY
JESS WOMACK
MICHAEL B. SCHWERDTFEGER

SIDLEY & AUSTIN
LARRY GUTTERRIDGE
LINDA S. PETERSON

By: _____
Gary A. Eaton
Attorneys for Plaintiff
Atlantic Richfield Company

AXA93C37.SEL

GARY A. EATON
1717 E. 15th STREET
TULSA, OKLAHOMA 74104
(918) 743-8781

JESS WOMACK
MICHAEL B. SCHWERDTFEGER
ATLANTIC RICHFIELD COMPANY
515 SOUTH FLOWER STREET
45th FLOOR
LOS ANGELES, CALIFORNIA 90071

LARRY G. GUTTERRIDGE
LINDA S. PETERSON
SIDLEY & AUSTIN
555 West Fifth Street, Suite 4000
Los Angeles, California 90013
(213) 896-6000

Attorneys for Plaintiff
ATLANTIC RICHFIELD COMPANY

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OKLAHOMA

ATLANTIC RICHFIELD COMPANY, Plaintiff, -vs- AMERICAN AIRLINES, et al., Defendants.	Case Nos. 89-C-868-B 89-C-869-B 90-C-859-B NOTICE OF DISMISSAL WITHOUT PREJUDICE OF ROBERT D. KELLY

Pursuant to Federal Rule of Civil Procedure 41(a)(1), all claims which the Plaintiff Atlantic Richfield Company has filed in

this action against Defendant Robert D. Kelly are hereby dismissed without prejudice.

Dated: August 31, 1993

GARY A. EATON

ATLANTIC RICHFIELD COMPANY
JESS WOMACK
MICHAEL B. SCHWERDTFEGER

SIDLEY & AUSTIN
LARRY GUTTERRIDGE
LINDA S. PETERSON

By: _____
Gary A. Eaton
Attorneys for Plaintiff
Atlantic Richfield Company

AXA93B52.SEL

GARY A. EATON
1717 E. 15th STREET
TULSA, OKLAHOMA 74104
(918) 743-8781

JESS WOMACK
MICHAEL B. SCHWERDTFEGER
ATLANTIC RICHFIELD COMPANY
515 SOUTH FLOWER STREET
45th FLOOR
LOS ANGELES, CALIFORNIA 90071

LARRY G. GUTTERRIDGE
LINDA S. PETERSON
ALAN AU
SIDLEY & AUSTIN
555 West Fifth Street, Suite 4000
Los Angeles, California 90013
(213) 896-6000

Attorneys for Plaintiff
ATLANTIC RICHFIELD COMPANY

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OKLAHOMA

ATLANTIC RICHFIELD COMPANY, Plaintiff, -vs- AMERICAN AIRLINES, et al., Defendants.	Case Nos. 89-C-868-B 89-C-869-B 90-C-859-B NOTICE OF DISMISSAL WITHOUT PREJUDICE

Pursuant to Federal Rule of Civil Procedure 41(a)(1), all claims which the Plaintiff Atlantic Richfield Company have filed in

this action against the following defendants are hereby dismissed without prejudice:

David Neiman

J. Michael McClanahan

Muskogee Ford Tractor, Inc.

Oreona Corporation

Robert E. Kershaw

Rodney F. Wilson

Thomas Wayne Inman, Sr.

Dated: August 31, 1993

GARY A. EATON

ATLANTIC RICHFIELD COMPANY
JESS WOMACK
MICHAEL B. SCHWERDTFEGER

SIDLEY & AUSTIN
LARRY GUTTERRIDGE
LINDA S. PETERSON
ALAN AU

By: _____
Gary A. Eaton
Attorneys for Plaintiff
Atlantic Richfield Company

AXA93B53.SEL

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JERALD G. WILSON,
an individual,

Plaintiff,

vs.

HOLIDAY INNS, INC.,
a Tennessee corporation; and
GREAT SOUTHERN FEDERAL SAVINGS
AND LOAN ASSOCIATION, AND
RESOLUTION TRUST COMPANY AS
RECEIVER/CONSERVATOR FOR
GREAT SOUTHERN FEDERAL SAVINGS
AND LOAN ASSOCIATION,

Defendants.

Case No. 92-C-984-C

JOINT STIPULATED DISMISSAL

COME NOW the Plaintiff, Jerald G. Wilson, and the Defendants, Great Southern Federal Savings and Loan Association, and Resolution Trust Corporation as Conservator for Great Southern Federal Savings and Loan Association, and do hereby enter their joint stipulated dismissal with prejudice against the Defendants, Great Southern Federal Savings and Loan Association, and Resolution Trust Corporation as Conservator for Great Southern Federal Savings and Loan Association, only.

JACKSON M. ZANERHAFT, OBA#
1717 South Boulder, Suite 910
Tulsa, Oklahoma 74119-4845
Attorney for Plaintiff

Susan J. Speaker

SUSAN J. SPEAKER, OBA #11524
15 West 6th Street, Suite 1801
Tulsa, Oklahoma 74119
Attorney for Great Southern Federal Savings and Loan Association and Resolution Trust Corporation as Conservator for Great Southern Federal Savings and Loan Association

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

TULSA CONCRETE COMPANY,)
)
Plaintiff(s),)
)
v.) 93-C-0035-B
)
WAYNE EDDIE NIGHTENGALE, ET AL,)
)
Defendant(s).)

ORDER

Now before the Court is Tulsa Concrete Company's appeal of a decision by the United States Bankruptcy Court.[1] The Bankruptcy Court found that Appellees Wayne and Dorothy Nightengale could, in effect, cure the mortgage on their house pursuant to 11 U.S.C. §1322. Tulsa Concrete now challenges that decision. For the reasons discussed below, the Bankruptcy Court's decision is affirmed.

I. Facts

On November 28, 1990, Wayne and Dorothy Nightengale ("Nightengales") borrowed $39,000 from Tulsa Concrete, who took a second mortgage on the Nightengales' principal residence.[2] The Nightengales borrowed the money to pay off an old business debt.[3]

The loan agreement ("Note") called for the Nightengales to repay the amount at 14 percent interest. The Note called for monthly installments, culminating in a final balloon

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[1] *The Court has jurisdiction pursuant to 28 U.S.C. § 1334.*

[2] *The Bank of Oklahoma has a first mortgage on the Nightengales' residence for some $11,000.*

[3] *Details of the antecedent business debt are not in the record. Wayne Nightengale apparently operated a business called Nightengale Construction Concrete.*

payment that was due on May 28, 1991. The Nightengales failed to timely make their payments. Once the Note matured, Tulsa Concrete began foreclosure proceedings.

On September 8, 1992, the Nightengales -- still owing Tulsa Concrete $28,761.35 -- filed a Chapter 13 bankruptcy petition. As a part of that filing, the Nightengales submitted an Amended Chapter 13 Wage Earner Plan that proposed for the Nightengales to repay Tulsa Concrete over a five-year period.[4] Tulsa Concrete objected, arguing that the plan violated 11 U.S.C. §1322 of the Bankruptcy Code. Despite the objections, however, the Bankruptcy Court approved the Nightengale's Chapter 13 plan. Tulsa Concrete challenges that decision in this appeal.

II. Legal Analysis

The issue is whether the Nightengales' Amended Chapter 13 Plan violates 11 U.S.C. §1322(b)(2) and/or (3) of the Bankruptcy Code. The applicable part of the statute reads:

> **The plan may (2) modify the rights of holders of secured claims, *other than a claim secured only by a security interest in real property that is the debtor's principal residence*...(3) provide for the curing or waiving of any default...** (Emphasis added.)

Pursuant to the original loan agreement, the Nightengales were required to repay the $39,000 loan by May 28, 1991. Tulsa Concrete asserts that the Nightengales' Chapter 13 amended plan, which allows them five additional years to repay the loan, is an impermissible modification under §1322(b)(2). The Bankruptcy Court rejected that argument, concluding that the Nightengales' amended plan was not a modification, but a

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[4] *The plan requires the Nightengales to pay Tulsa Concrete $311 a month for five years. At the end of that time, the Nightengales also will pay Tulsa Concrete a balloon payment in excess of $10,000.*

cure under §1322(b)(3).[5]

As the Bankruptcy Court noted, courts do not agree on the meaning of §1322(b)(2) and (3).[6] One line of authority states that the "plain meaning" of §1322(b)(2) prohibits a modification such as the one used in the Nightengales' amended plan -- especially when the promissory note is due prior to the bankruptcy filing. *In Re Seidel*, 752 F.2d 1382 (9th Cir. 1985)[7] Also see, *In Re Palazzolo*, 55 B.R. 17 (Bankr. E.D.N.Y. 1985) and *In Re Cooper*, 98 B.R. 294 (Bankr. W.D. Mich. 1989).

A second group of cases, however, reject the reasoning in *Seidel*. In *Grubbs v. Houston First American Savings Association*, 730 F.2d 236 (5th Cir. 1984)[8] The Fifth Circuit, after extensively reviewing the legislative history behind Chapter 13 of the Bankruptcy Code and of §1332(b), affirmed the debtor's plan. The court held that the plan did not modify the creditor's claim under §1322(b)(2). Furthermore, the court found the plan to be a permissible "cure" under §1322(b)(3). *Id.* at 247.

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[5] *At the hearing, the Bankruptcy Court explained his decision: "In this case, the creditors are adequately secured. There's a $20,000 equity cushion over and above the second mortgage. That's number 1. The other [reason] is the rehabilitative purpose of the Code, which is the social welfare purposes of the Code to protect the debtor's home and allow him to keep the residence...And, that is, of course, the overall purpose of Chapter 13 is to rehabilitate the debtor while paying the creditors...That's what my ruling is doing, it's allowing the debtor to keep the home, to pay the creditor in full, and, at the same time, the creditor is adequately protected because there's equity in the house." Transcript of Proceedings, January 26, 1993, pages 17-18.*

[6] *No mandatory precedent exists as neither the United States Supreme Court nor the Tenth Circuit have examined this issue.*

[7] *The facts in Seidel are similar to the ones here. Seidel purchased a home and gave the sellers a promissory note secured by a mortgage on their principal residence. The loan became due and Seidel defaulted. The sellers commenced foreclosure proceedings. Seidel then filed Chapter 13 bankruptcy. The loan became due. Seidel then filed a Chapter 13 plan that proposed to pay the debt back in 60 monthly installments, culminating with a final $4,000 balloon payment.*

[8] *In Houston First, the debtor borrowed some $12,500 from Houston First. The promissory note, secured by a second mortgage on the debtor's principal residence, called for monthly payments. The debtor failed to make his payments, and Houston First accelerated the loan. Houston First accelerated the loan and subsequently began foreclosure proceedings. The debtor filed bankruptcy under Chapter 13, proposing a plan of repaying the debt over a 36-month period. Id. at 237-238.*

The holding in *Grubbs* was explained in *In Re Rudolf Williams*[9], a case this Court finds persuasive. The *Williams* case focused on debtors who executed a second mortgage on their residence in exchange for a $15,000 loan ("Second Mortgage"). The Second Mortgage required the debtors to make monthly installments of interest only at the rate of 16 percent for one year. At the end of that year, the debtors were to pay the entire principal balance of $15,000 in one balloon payment. *Id. at 37-38.* Similar to the case at bar, however, the debtors failed to make some of the monthly installments and did not make the balloon payment.

The debtors subsequently filed Chapter 13 bankruptcy. They then filed a Wage Earner Plan, proposing to repay the Second Mortgage at $425 a month for the first 24 months and $533 monthly for three years after that. The Plan provided for full payment of the Second Mortgage, along with late charges and additional interest. In addition, the debtors' principal residence had a market value of $80,000, some $37,000 more than what they owed creditors.

In citing *Grubbs*, the *Williams* court held that the debtors could use the Chapter 13 plan to cure the default of the Second Mortgage, provided that the creditor received nothing less than full payment over the life of the Plan. Explained the court:

> **A debtor's right to cure should be interpreted so as to permit the debtor to use any method otherwise available to him to make the creditor whole, while at the same time, protect[ing] his assets. Accordingly, this Court believes that if a debtor's plan provides for payments with interest, the present value of which equals the full amount of the judgment plus interests and costs, the mortgagee is receiving exactly that which he would receive if the mortgagor debtor was to tender full payment and therefore is not a modification of the**

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[9] *109 B.R. 36 (Bankr. E.D.N.Y. 1989)*

creditor's rights, but is a cure of the debtor's default pursuant to Section 1322(b)(3). *In Re Williams*, 109 B.R. 36, 41 (Bankr. E.D.N.Y. 1989)

The court in *Williams* also emphasized the purpose of Chapter 13, which is to "enable an individual, under court supervision and protection to develop and perform under a plan for the repayment of his debts over an extended period...The benefit of the debtor of developing a plan of repayment under Chapter 13 rather than opting for liquidation under Chapter 7, is that it permits the debtor to protect his assets...Under Chapter 13, the debtor may retain his property by agreeing to repay his creditors." *H.R. Rep. No. 595, 95th Cong. 1st Sess. 118, U.S.Code Cong. & Admin.News, 5787,6079.*

The facts in *Williams* are similar to the instant case. In both cases, the debtors' second mortgage included monthly installments and a final balloon payment, although the amounts were structured differently. In addition, the debtors in *Williams* had equity beyond what was owed on the first and second mortgages as did the Nightengales.

Another similar fact, which is persuasive here, is that the Nightengales took out the Note (i.e. second mortgage) as a short-term loan to pay off an antecedent debt. The debtors in *Williams* did the same thing, prompting that court to write:

> This Court concurs with the cases that hold the true congressional intent behind the Section 1322(b)(2) exception for claims secured only by an interest in the debtor's principal residence is to protect the traditional mortgage lender who provides long-term financing that enables individuals to purchase their home...Congress did not intend to provide this same exceptional protection to lenders who provide short-term consumer financing to individuals and take a junior lien on their home as collateral. (emphasis added). *Id. at 42.*[10]

[10] *The court in Williams also wrote: "In recent times, the rise in the average price of a home has increased dramatically leaving many individuals with a considerable equity cushion in their homes. Many lenders have developed creative financing devices which encourage individual homeowners to borrow funds using this new found equity as collateral without inquiry as to their ability to repay. These are not the same lenders that provide stability to the housing market by providing a home buyer with the initial financing that allows him to purchase his*

added). *Id. at 42.*[11]

After examining the record, the Court affirms the Bankruptcy Court's decision for the following reasons. First, the Nightengales' residence has a $20,000 equity cushion, which offers sufficient protection to Tulsa Concrete. Second, the decision is in line with the purpose behind Chapter 13 as it allows the Nightengales to keep their home, while at the same time, paying Tulsa Concrete in full. Third, the Nightengales' Second Mortgage to Tulsa Concrete was a short-term loan, which does not merit the "exceptional protection" under §1322(b)(2). Consequently, the Bankruptcy Court was justified in confirming the Nightengales' amended plan. *See, generally, In Re Spader*, 66 B.R. 618, 623 (W.D. Mo. 1986). Accordingly, the Bankruptcy Court's decision is **AFFIRMED.**

SO ORDERED THIS 2nd day of Sept., 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

[11] *The court in Williams also wrote: "In recent times, the rise in the average price of a home has increased dramatically leaving many individuals with a considerable equity cushion in their homes. Many lenders have developed creative financing devices which encourage individual homeowners to borrow funds using this new found equity as collateral without inquiry as to their ability to repay. These are not the same lenders that provide stability to the housing market by providing a home buyer with the initial financing that allows him to purchase his home. These are lenders that make financing available to individual[s] that may be financially unstable and a high risk, at a high rate of interest, while taking a security in the individuals' home to insure the repayment of the debt. This Court does not believe that they were intended to receive any special benefit from Section 1322(b)(2) and payment in full over the life of the Plan is all they are entitled to. Id. at 42.*

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FRAZIER RICHARDSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	91-C-576-B
	)	
LOUIS W. SULLIVAN, M.D.,	)	
	)	
Defendant.	)	

ORDER

Plaintiff Ms. Richardson brought this action pursuant to 42 U.S.C. §405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying Plaintiff's application for disability insurance benefits under §§216(i) and 223 of Title II of the Social Security Act, 42 U.S.C. §§ 416(i) and 423. This matter is before the court for decision following appeal from an adverse decision by the Secretary.

The only issue now before this court is whether there is substantial evidence in the record to support the final decision of the Secretary that Plaintiff is not disabled within the meaning of the Social Security Act, and that Plaintiff can return to her past relevant work.

I. Summary of the Evidence

At the time of Plaintiff's October 17, 1989 administrative hearing, she was 47 years old and had completed the 9th grade. Her previous employment consisted of work as a housekeeper and traffic control coordinator at a hospital, as a bus driver for a public school, and for the Tulsa Transit Authority. Plaintiff claims that she became unable to work on September 24, 1987, the alleged onset date of disability, following an injury from

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a work related accident on June 29, 1987.

Plaintiff was initially seen by Dr. Framjee, an orthopedic surgeon, on July 30, 1987 for mechanical low back pain with left sided radiculitis. In August 1987, Plaintiff was hospitalized. Her low back pain resolved by time of discharge. (Tr. at 165.) Dr. Framjee released Plaintiff to return to her job as a bus driver. (Tr. at 170.) Due to persistent complaints of pain, Dr. Framjee conducted a lumbar myelogram and CT scan in October 1987 which showed a herniated disc at L5-S1. (Tr. at 172.) Dr. Framjee opined that if Plaintiff's symptoms persisted, surgery would be indicated.

Plaintiff wanted a second opinion and in November 1987 she saw Dr. Mayosa who also opined that if Plaintiff's condition did not improve, surgery would be recommended. Dr. Mayosa stated that:

> **Based on the history and physical exam, I am of the opinion that the patient remains totally disabled. The patient does in my opinion appear to be disabled as a result of her injury ... I certainly do not believe that patient is capable of operating a transit bus.** Tr. at 254.

Subsequently, Dr. Mayosa performed a laminectomy and disc excision on January 13, 1988 at L5-S1. (Tr. at 184.) After surgery, Ms. Richardson's prognosis was guarded. Dr. Mayosa observed that a L5 to S1 fusion would be necessary if narrowing of the disc space occurred accompanied by increased pain and disability. (Tr. at 187.)

In March 1988, Dr. Mayosa stated that Plaintiff could resume driving a transit bus provided it had power steering and an automatic transmission. (Tr. at 250.) After this date, however, Dr. Mayosa repeatedly states that Plaintiff will never be able to return to driving a bus.

In June 1988, Dr. Mayosa noted increased pain and disability. New lumbar x-rays revealed narrowing of the L5 disc space. (Tr. at 256, 257.) Dr. Mayosa recommended that Plaintiff seek vocational rehabilitation. This recommendation was affirmed in November 1988. Dr. Mayosa stated that he had

> **explained to the patient there has been a disc space collapse and this has in turn produced an irritation of the nerve root and resulting instability due to the fact that she had an extraverted or free fragment on the spinal nerve which has enhanced the scarring about the nerve root ... I diagrammed these options and my recommendation is that she avoid surgery if at all possible and seek a light work assignment and not return to a bus driving position. Tr. at 242.**

An MRI scan done in July 1988 showed no evidence of herniated nucleus pulposus or canal compression. (Tr. at 198.)

In November 1988, Plaintiff also saw Dr. Andelman, a consultative medical examiner ("CE"), who noted a restricted range of motion in Plaintiff's neck, hip, and left knee, together with decreased reflexes in the left knee, loss of sensation in the fourth toe of the left foot, and marked tenderness in the hip and lumbosacral spine. (Tr. at 231.) The CE also noted that Plaintiff's left leg is shorter because of her inability to extend it. The CE concluded that

> **this female has definite disability in her left lower extremity which may be an entrapment of her nerve at the exit to the left leg. She cannot stand on her left leg although she can walk on her toes and heels. She is unable to sit for any length of time and frequently during the questioning she would get up because of the pain in her leg and what she would say spasm and difficulty. This patient cannot go back to the type of work she has been doing and is disabled from performing that type of activity.** *Id.*

In February 1989, Dr. Mayosa observed that Plaintiff would have to be in a new work capacity with a 25 pound permanent weight restriction. (Tr. at 238.) He felt that

Plaintiff had reached maximum medical improvement with a 30% permanent partial impairment to the whole body. Additionally, in July 1989 Dr. Mayosa stated that Plaintiff's **"disability status remains the same, namely she is disabled and not able to perform her previous work activities."** (Tr. at 240.) Dr. Mayosa also repeats his opinion that Plaintiff is unable to return to work as a bus driver in November 1989. Despite this, he adds that **"we have to consider rehabilitation so she can consider some other work related activities that would not require her to wrestle around the city streets."** (Tr. at 10.)

Plaintiff was given a psychological examination by Dr. Mancuso in November 1989. (Tr. at 276-289.) Dr. Mancuso concluded that Plaintiff was mentally capable of performing jobs similar to those she had performed in the past. He nevertheless further stated that while it was impossible to say whether Plaintiff's physical complaints had a physical basis or not, test results suggested that even if there was a physical basis, there was some exaggeration of her complaints. Dr. Mancuso assessed that Plaintiff had a fair ability to maintain concentration, and a good ability to interact with supervisors, deal with work stresses, follow work rules, deal with the public, and exercise judgment. *Id.*

In December 1989, Plaintiff was psychiatrically examined by Dr. Passmore. (Tr. at 269-273.) Dr. Passmore expressed the opinion that Plaintiff exhibited depression, and showed evidence of somatoform disorder, in that she appeared to be concerned "with all sorts of physical problems." Dr. Passmore concluded that Plaintiff had a fair ability to deal with work stresses, a good ability to maintain concentration, and a very good/unlimited ability to interact with supervisors, function independently, follow work rules, relate to co-workers, deal with the public, and use judgment. (Tr. at 272.)

Prior to the review by the Appeals Council, Plaintiff submitted additional progress reports from Dr. Mayosa which were not considered by the ALJ. In two such reports, dated April 1990 and May 1990, Dr. Mayosa stated that Plaintiff was to remain off work status. (Tr. at 11-12.) In the May report, Dr. Mayosa also stated that Plaintiff's vocational rehabilitation training "will not be decided at this time". He adds in July 1990 that Plaintiff **"remains disabled temporarily in that she is not able to return to her work as a bus driver"**. (Tr at 13.)

II. Legal Analysis

Judicial review of the Secretary's decision is limited in scope by 42 U.S.C. 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decision. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971). Evidence is not substantial if it is overwhelmed by other evidence or if it is actually mere conclusion. *Williams v. Bowen*, 801 F.2d 746, 750 (10th Cir. 1988).

When deciding a claim for benefits under the Social Security Act, the ALJ must use the following five step evaluation:

1. Whether the claimant is currently working;

2. Whether the claimant has a severe impairment;

3. Whether the claimant's condition meets or equals an impairment listed in 20 C.F.R. Pt. 404, Subpt. P, App. 1 (1991);

4. Whether the impairment precludes the claimant form doing his past relevant work; and

5. Whether the impairment precludes the claimant from doing any other work which exists in the national economy 20 C.F.R. 104.1520 (b)-(f) (1991).

If the Secretary finds the claimant disabled or non-disabled at any step, the review ends. *Gossett v. Bowen*, 862 F.2d 802, 805 (10th Cir. 1988).

In the case at bar, the ALJ made his determination at the fourth step of the sequential evaluation process. The ALJ found that Plaintiff had the residual functional capacity to perform work-related activities except for work involving lifting and carrying more than 25 pounds and work requiring ability to understand, remember and carry out complex job instructions. (Tr. at 32.) Specifically, the ALJ found that Plaintiff could return to her past relevant job as a hospital traffic control coordinator. *Id.* Having determined that Plaintiff could return to past relevant work, the ALJ determined that she was not disabled under the Social Security Act at any time through the date of this decision.

Plaintiff now appeals this ruling, and asserts three alleged errors by the ALJ.

(1) That the ALJ selectively reviewed the medical evidence and failed to give substantial weight to the opinions of Plaintiff's treating physician;

(2) The ALJ failed to make specific findings regarding the residual functional capacity required for Plaintiff's previous relevant work: and

(3) That the ALJ incorrectly evaluated Plaintiff's pain in finding that Plaintiff could perform sustained work activities.

At the fourth stage of the process, the burden of proof remains on the Plaintiff to demonstrate that she cannot perform one or more past relevant jobs. *Potter v. Secretary*, 905 F.2d 1346, 1349 (10th Cir. 1990). Under the Secretary's regulations, a claimant like Plaintiff may be found "not disabled" when she retains the ability to perform one or more

past jobs as performed by her or as generally performed in the national economy. *Potter v. Secretary*, 905 F.2d at 1349. 20 C.F.R. 404.1520(e) (1992). After a thorough review of the record and testimony in this case, this Court cannot say that the Plaintiff met her burden and that the Secretary's decision is not supported by substantial evidence.

Addressing Plaintiff's first assertion of error, the well established rule in the Tenth Circuit is that the Secretary must give substantial weight to the testimony of claimant's treating physician, unless good cause is shown to the contrary. *Turner v. Heckler,* 754 F.2d 326, 329 (10th Cir. 1985). Specifically, "the reports of physician who have treated a patient over a period of time or who are consulted for purposes of treatment are given greater weight than are the reports of physicians employed and paid by the government for the purpose of defending against a disability claim." *Id.* (quoting *Broadbent v. Harris*, 698 F.2d 407, 412 (10th Cir. 1983)).

In reaching a determination that Plaintiff was able to return to her past relevant work, the ALJ evidently relied heavily on the opinions of Plaintiff's treating physician, Dr. Mayosa. The ALJ noted that the only permanent restriction placed on Plaintiff was that she could not lift over 25 pounds. (Tr. at 238.) In addition, while Dr. Mayosa repeatedly recommended that Plaintiff not return to her work as a bus driver, he nevertheless felt that Plaintiff was a candidate for vocational rehabilitation. In fact, he recommended to Plaintiff throughout the course of her treatment that she seek a light work assignment, not requiring repeated heavy lifting, twisting or bending. (Tr. at 238, 242, 240, 10, 13.) Although Dr. Mayosa stated on several occasions that Plaintiff was disabled, these comments were generally made in reference to Plaintiff's inability to drive a bus. For

example, on July 1990 Dr. Mayosa stated that the "patient remains disabled temporarily in that she is not able to return to her work as a bus driver." Tr at 13. The ALJ relied on and gave appropriate weight to the opinions of Plaintiff's treating physician.

Plaintiff argues that the ALJ selectively reviewed the medical evidence and failed to acknowledge Plaintiff's June 1988 lumbar x-rays which evidence Plaintiff' disc space collapse. Assessing the x-rays in November 1988, Dr. Mayosa stated that he informed the patient of her disc space collapse; and recommended that Plaintiff avoid surgery if at all possible, seeking instead a light work assignment. (Tr. at 242.) Even though Dr. Mayosa recognized that his recommendation may produce some nerve root irritation, he still felt that Plaintiff was capable of light work activities. Therefore, Plaintiff's argument that the ALJ selectively received the medical evidence is without merit.

Plaintiff also argues that the ALJ ignored the opinions of Dr. Andelman, the consultative examiner, in so far as they substantiate the disability claims of the Plaintiff. The CE opined that the Plaintiff had a definite disability in her left lower extremity which may be caused by an entrapment of the nerve at the exit to her left leg. The ALJ considered and then rejected these opinions stating that the **"physician did not report observing any evidence of muscle spasm, and reported minimal objective findings of any impairment."** (Tr. at 26.) Examining physician's opinions are to be given less weight in the evaluation of disability than are those of a treating physician. See, *Turner v. Heckler*, 754 F.2d at 329.

Next, Plaintiff takes issue with the ALJ's finding that Plaintiff retained the residual functional capacity ("RFC") to do basic work-related activities, stating that the ALJ failed

to make specific findings regarding the RFC required for Plaintiff's past relevant work. The undersigned finds this argument also without merit. To determine whether Plaintiff could perform her former work, the ALJ is required to assess the physical demands of the job. *Villa v. Sullivan*, 895 F.2d 1019, 1022 (5th Cir. 1990)(cf. *Hollis v. Bowen*, 837 F.2d 1378 (5th Cir. 1988)). This determination may rest on descriptions of past work as actually performed or as generally performed in the national economy. *Id.* Soc. Sec. Rul. 82-61 (C.E. 1982).[1]

Here, the ALJ found that Plaintiff could return to her past job as a system traffic control coordinator. He noted that this job, as specifically performed by Plaintiff, required that she walk 1 hour per 8 hour day and lift no more than 10 pounds. (Tr. at 101, 107.) In addition, given the results of Plaintiff's psychological and psychiatric reports, Plaintiff has the mental capacity to perform this job.

Lastly, Plaintiff asserts that the ALJ erred in evaluating Plaintiff's claim of disabling pain. "Pain testimony should be consistent with the degree of pain that could be reasonably expected from a determinable medical abnormality. *Hargis v. Sullivan*, 945 F.2d 1482, 1489 (10th Cir. 1991) (quoting *Huston v. Bowen, 838 F.2d 1125, 1129 (10th Cir. 1988)).* "[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all the relevant evidence." *Id.* (quoting *Luna v. Bowen) 834 F.2d 161, 164 (10th Cir. 1987)) (emphasis in original).*

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[1] *Social Security Ruling 82-61 defines "past relevant work" as the actual demands of past work of the "functional demands ... of the occupation as generally required by employers throughout the national economy."*

The ALJ concluded that while Plaintiff may experience some pain, mild to moderate pain is not incompatible with the performance of sustained work activities. (Tr. at 31.) Essentially, the ALJ found that in light of all the other evidence, Plaintiff's complaints of disabling pain were not credible.

There are certain factors that an ALJ should take into consideration when determining the credibility of pain testimony. See, *Huston v. Bowen*, 838 F.2d 1125 (10th Cir. 1988).

> **Some of the possible factors include: the levels of medication and their effectiveness, the extensiveness of the attempts (medical or nonmedical(to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the realm of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence.**

Id. at 1132 (emphasis added).

A review of the ALJ's opinion reveals that the Secretary took many of these factors into account when evaluating Plaintiff's claim.[2] The medical reports, while evidencing some narrowing of the disc space and some degenerative changes, did not reveal any evidence of herniated nucleus pulposus or canal compression. In addition, the assessment by the Plaintiff's treating physician that she should seek suitable light employment reasonably supports an inference that the claimant does not suffer from completely disabling pain. See, *Id.* at 1489.[3]

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[2] *Plaintiff contends that the ALJ incorrectly considered the fact that Plaintiff was receiving long term disability payments from a private policy which would cease if she returned to work. Given the factors enumerated in Huston, the ALJ did not err in recognizing that secondary gain may play a role in Plaintiff's claim.*

[3] *"Unless good cause is shown to the contrary, the Secretary must give substantial weight to the testimony of the claimant's treating physician." Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984).*

Despite repeated notations demonstrating that the claimant suffers from pain, the undersigned nevertheless finds that the opinions of the ALJ, after giving full consideration to all relevant facts is supported by substantial evidence. Therefore, the Secretary's decision is **affirmed.**

SO ORDERED THIS 2nd day of Sept., 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 9-2-93

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CORA M. ELLIS,

Plaintiff,

vs.

DOCTORS' HOSPITAL - TULSA, INC.

and

NOTAMI HOSPITALS OF OKLAHOMA, INC.

and

EPIC HEALTH CARE SERVICES, INC.,

Defendants.

Case No. 92-C-608-E

FILED

SEP 2 1993

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL WITH PREJUDICE

The parties hereby stipulate to the dismissal with prejudice of all of Plaintiff's pending claims against Defendants. Each party is to bear their own costs, interest and attorneys' fees.

Respectfully submitted,

C. W. Daimon Jacobs, OBA #14107
610 Main Street
Tulsa, Oklahoma 74119

ATTORNEY FOR PLAINTIFF

HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.

Ronald A. White, OBA #12037
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172

ATTORNEYS FOR DEFENDANTS

RAW-3330

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JACQUELINE GORDON, et al.,

Plaintiffs,

vs.

CITY OF TULSA, et al.,

Defendants.

No. 91-C-124-E

ORDER AND JUDGMENT

This lawsuit was brought by Jacqueline Gordon and her spouse, George Gordon, pro se, seeking damages for actions allegedly taken by the Defendants following Jacqueline Gordon's arrest and incarceration in Tulsa City-County Jail on two different occasions. Ms. Gordon contends that Defendants violated her federal rights during the incarcerations. It is stipulated that the Defendants were employees of Tulsa County acting in their official capacities and under color of law at all times relevant to the instant case. This lawsuit encompasses Ms. Gordon's claims of false arrest, false imprisonment, cruel and unusual punishment, deliberate indifference, denial of equal protection and due process, denial of free exercise of religious practices, religious discrimination and persecution, racial discrimination and persecution, sexual harassment, emotional distress, malicious prosecution, violations of Federal Standards of Prisons and Jails and conspiracy by the Defendants in violation of her rights under the First, Fourth, Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. §1983, §1985. George Gordon seeks

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damages for loss of consortium resulting from the injuries Jacqueline Gordon is alleged to have sustained as a result of Defendants' actions. The case was heard by the Court from August 2 through August 16, 1993.

As a preliminary matter, the Court will address the Defendants' Motion to Dismiss the claim of George Gordon for want of subject-matter jurisdiction. The Court will deny that motion finding that it has supplemental jurisdiction authority to join the consortium claim pursuant to 28 U.S.C. §1367.

In addressing Ms. Gordon's claims, the Court will adopt the following analytical approach to the record:

1. Was the evidence presented by Ms. Gordon in support of each allegation credible;
2. Assuming, arguendo, that her evidence was credible, was it sufficient to establish a federally protected right;
3. Even if Ms. Gordon established a prima facie case as to any claim, can Defendants avail themselves of an adequate defense?

Background

Mr. and Mrs. Gordon are members of a religious sect which could be characterized as "Christian" in that it seeks authority and guidance from both the Old and New Testaments and because it maintains that Jesus Christ is the Messiah who will come to Earth again. In addition, the Gordons testified that they consider themselves to be "Hebrews" because they follow the "Law of Moses". However, the Gordons' beliefs do not mirror Orthodox Judaism,

because the Gordons interpret the laws differently in certain notable respects. For example, the Gordons do not follow the traditional Judaic calendar in determining when to celebrate Passover; rather, Mr. Gordon -- as "patriarchal" head of the family - calculates when the celebration should occur based upon his interpretation of certain sacred texts. Several of Ms. Gordon's claims have their genesis in what Ms. Gordon characterizes as violations of her federal protected right to practice in accordance with the beliefs of this religious sect while she was incarcerated.

Another subset of her claims arises out of the assertion that her physical condition demanded certain medical and dietary regimes to which Defendants were not attentive during her incarceration.

The third principal focus of her case concerns her allegations that she was subjected to excessive force in connection with the booking procedures of the Tulsa City-County jail during both incarcerations.

These three subjects of concern comprise the major portion of Ms. Gordon's case and will be first addressed.

I. Alleged Infringements of Ms. Gordon's Federally Protected Rights to Practice Her Religion.

A. Evidence

Ms. Gordon was incarcerated in the Tulsa City-County jail on two occasions: first, from March 7, 1989 through March 15, 1989 on a felony charge; and then, from October 30, 1990 through November 16, 1990 on a misdemeanor charge. She alleges that on one or both occasions she was denied free exercise of her religious practices

and/or subjected to religious discrimination and persecution in the following particulars:

1. Mixed Fabric Clothing. Ms. Gordon testified that her religion prohibited her from wearing the standard jail uniform because it was woven of "mixed fabrics" in violation of Leviticus 19:19. The evidence adduced at trial indicated that Ms. Gordon wore the standard "mixed fabric" uniform during the 1989 incarceration but refused to wear the uniform during the 1990 incarceration - insisting that religious tenets permitted her only to wear the underwear provided by the jail. The Defendants produced evidence indicating that the underwear was also of "mixed fabric". As a result of Ms. Gordon's refusal to wear appropriate prison apparel she was not permitted to see visitors. The evidence indicated that Ms. Gordon was not permitted to wear the 100% cotton uniform she brought with her to jail because it violated prison policy to permit inmates to wear clothing not provided by the prison and because the drawstring on the uniform constituted a hazard in the prison environment.

2. Hairbrush. Similarly, the jail officials refused to permit Ms. Gordon to have a hairbrush with which to groom her hair because it could easily be

converted to a "shank" or weapon. The jail permits, instead, the use of combs or "pics". Ms. Gordon testified this policy violated her religious rights because the Bible prohibited her from cutting her hair; and a comb would cause discomfort as a grooming aid for her long hair.

3. Diet. Ms. Gordon testified that her religion proscribed the ingestion of impure foods and of pork. The evidence on the record shows that Ms. Gordon was not permitted to receive, by mail or by visitor, food from the "outside" pursuant to standard jail policy regarding contraband. However, the credible evidence also shows that, upon request, Ms. Gordon was provided the Orthodox Jewish menu from the jail kitchen, and that on other occasions she did ingest food cooked in pork.

4. "Rabbi". Ms. Gordon testified that jail officials forbade her from receiving a visitor who professed to be a Rabbi. The evidence indicates that it is jail policy to require those individuals who seek to provide religious ministry to inmates to be certified by a religious sect. The record indicates that the individual in question was not certified by any sect; that the Tulsa Metropolitan Ministry reported to Defendant Captain Helms that the individual was not a Jewish Rabbi; that the

individual had previously written a threatening letter to the judge who presided over his divorce proceeding in state court and that he had previously been sanctioned for disruptive and physically inappropriate behavior within the Tulsa City-County jail.

B. Legal Authority.

Generally speaking, the First Amendment protects religion in two ways: the Establishment Clause forecloses the establishment of a state religion by insuring that regulations which encroach upon religious practice are 1) secular in purpose; 2) neither advance nor inhibit religion; 3) and not foster excessive government entanglement with religion. See e.g., Larkin v. Grendel's Den, Inc., 103 S.Ct. 505 (1982). Thus, the overriding concern of the Establishment Clause is to maintain a posture of government neutrality in matters of religion. Gillette v. U.S., 91 S.Ct. 828 (1971). By contrast, the overriding concern of the Free Exercise Clause is to foreclose government interference with the practice of religious faith absent a compelling state interest. And even where the government can demonstrate a public interest of sufficient import to justify restriction, the means to achieve the state's purpose must be the least restrictive available. Brandon v. Board of Ed. of Guilderland Cent. Sch., 635 F.2d 971 (2nd

Cir. 1980), cert. denied, 102 S.Ct. 970, rehearing denied, 102 S.Ct. 1493. Accommodation of the various principles which undergird the First Amendment on free exercise issues require a balancing process and are, thus, fact specific. Or as the Court succinctly put it in Brandon, "[q]uestions of religious freedom can depend on sensitive issues of fact." Id. at 973. In Brandon, the question posed was the validity of state infringement of religion in the public school setting. The case at bar involves state regulation of religious practices in jail. Special legal guidelines apply in the prison setting: while the right of free exercise is protected in prison, it is subject to special restrictions designed to achieve legitimate correctional goals and to maintain institutional security. See, e.g., Caldwell v. Miller, 790 F.2d 589 (7th Cir. 1986). In Caldwell an inmate challenged prison lock down procedures as impermissably impinging upon his right to freely practice his religion. The Court opined that "[l]awful incarceration necessarily brings with it the restriction of many privileges and rights." Id. at 595, citing Hudson v. Palmer, 104 S.Ct. 3195, 3199 (1984)(additional citations omitted). Nevertheless, the Court cautioned, "[w]e must ... carefully scrutinize prison restrictions that affect an inmate's free-exercise rights 'to ascertain the extent to which they are necessary to effectuate the legitimate

policies and goals of the corrections system.'" Id. at 596, quoting, Childs v. Duckworth, 705 F.2d 915, 922 (7th Cir. 1983). Prison restrictions on free exercise of religious practice are justified only if they are "reasonably adapted" to achieving an important penological objective. Id. at 596 (footnote and citation omitted). In scrutinizing the regulations, the Seventh Circuit cautioned that courts must accord prison officials "wide-ranging deference in adopting policies that are needed to preserve internal order and security." Id. (citations omitted). Thus, once prison officials have articulated legitimate penological considerations which support the restrictive policy, the Court "must defer to their judgment, unless the inmate can demonstrate that these officials have exaggerated their response to those security considerations ... or that they are unreasonable in their belief that these considerations are implicated". (citations omitted).

In a case which is somewhat analogous to the case at bar, Udey v. Kastner, 644 F.Supp. 1441 (E.D. Tex. 1986), aff'd, 805 F.2d 1218 (5th Cir 1986), the district court held that an inmate's dietary requirements arising from sincerely held religious beliefs could be restricted where the interests were outweighed by legitimate penological considerations of cost, administration and security. In that case, Edwin Udney asserted that an

"organic diet" was mandated by his religious convictions. The Court found that the increased cost of the diet (which, as in the case at bar, included distilled water), the additional security problems associated with contraband and pilferage; the administrative burden of providing "organic" fruits, juices, vegetables and meats; and the potential for a proliferation of claims for specialized dietary regimes which would have a disruptive effect on prison order and discipline outweighed the inmate's free exercise rights to a special diet.

As in Udey, where the court specifically found[1] that the inmate's requested dietary regime was compelled by sincerely held religious beliefs, thus the Court must make a threshold inquiring into the beliefs which underpin the inmate's claim. In so doing, the Court must apply a two-pronged test: is the professed belief religious in nature? (See, Wisconsin v. Yoder, 92 S.Ct. 1526 (1972). And if so, does the claimant sincerely hold the belief? See International Society for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430 (2nd Cir. 1981); Africa v. Com. of Pa., 662 F.2d 1025 (3rd Cir. 1981), cert. denied, 102 S.Ct. 1756.

The foregoing state the legal principles to be applied to Ms. Gordon's First Amendment claim. Turning

[1]Indeed, the trial court was initially reversed and remanded on the issue of "sincerity" after the first ruling upholding the Report and Recommendation of the Magistrate. Id. at 1442.

now to Ms. Gordon's claim of religious discrimination and persecution in violation of 42 U.S.C. §1983, it is settled that prison officials are protected by the doctrine of good faith immunity unless their conduct violates clearly established federal rights of which a reasonable person would have known. Bennis v. Gable, 823 F.2d 723 (3rd Cir. 1987).

C. Analysis.

Applying the above-identified three-step analysis to Ms. Gordon's religious claims, the court concludes that:

1. She failed to present credible evidence that her demands regarding diet and clothing were inspired by religious beliefs. Her behavior with regard to these two issues appears inconsistent or ambivalent, at best, on the record before the Court. This calls into question the sincerity of her professed beliefs with regard to diet and dress.

2. Assuming, arguendo, that the evidence in support of her claims is credible, her beliefs sincerely held and religious in nature, her demand for a hairbrush fails for want of constitutional attributes;

3. But even if all four claims can be said to pass the prima facie hurdle, they must surely be outweighed - in each case - by the legitimate and reasonable penological considerations of security and order

advanced by the Defendants. Finally, the Court finds that the specific claims asserted do not constitute "clearly established" federal rights of which a reasonable person would have been apprised. Therefore, the Court concludes that all claims brought by Ms. Gordon pursuant to her First Amendment and §1983 rights premised upon her religion must be DISMISSED.

II. Allegations Concerning Ms. Gordon's Medical and Dietary Demands Relative to her Physical Condition.

A. Evidence

Ms. Gordon testified that, prior to her incarceration, she had had cancer. Several of her expert witnesses testified that she had reported to them that she had previously had cancer. She reported the same information to the medical personnel at Tulsa City-County Jail. However, she refused to participate in any medical tests at the jail that would verify the condition - citing religious strictures against invasive medical procedures. Further, Defendants testified that their attempts to locate a doctor who had medical knowledge of her alleged condition were unsuccessful. Thus, the only probative evidence on the record of the alleged condition is the testimony of the Plaintiff, Ms. Gordon.

Ms. Gordon also testified that because of her previous bout with cancer she was compelled to administer

a coffee enema to herself on a daily basis (actually, six times per week) and her diet was also restricted to the special diet referred to above. She further testified that the medical personnel refused to authorize either the diet or the enema on her behalf. The medical personnel reported that there was no medical basis for her demands, and there was no evidence of cancer in her medical records.

B. Legal Authority.

It is settled that prison medical personnel have wide discretion in treating prisoners: Tolbert v. Eyman, 434 F.2d 625 (9th Cir. 1970). The basic question for the Court is not whether the medical officials have reached the "right" or even the "best" medical decision but whether they have made a reasonable medical decision in light of the information before them and taking into consideration the wide range of discretion to be afforded their medical expertise. Negron v. Preiser, 382 F.Supp. 535 (S.D.N.Y. 1974). In order to make out a §1983 claim of deprivation of federally protected rights in the arena of medical care, a prisoner must go well beyond proving incorrect treatment or even medical malpractice. The acts complained of must evince a deliberate indifference to serious medical needs or intentional disregard of professionally prescribed treatment. Lewandowski v. Fauver, 531 F.Supp. 53 (D.N.J. 1981).

C. Analysis

Based upon the foregoing evidence and legal authority the Court concludes that:

1. Ms. Gordon did not offer credible evidence that she ever had cancer;

2. Assuming, arguendo, that her testimony was medically credible it is not sufficient to sustain a claim under §1983 because at most, it establishes a difference of opinion between Ms. Gordon and the medical officials as to whether the regimes demanded were medically cognizable or proper.

3. Therefore, the Court need not consider whether the "good faith defense" is available to Defendants and the Court, accordingly, concludes that Ms. Gordon's claims relative to her medical demands must be DISMISSED.

III. Allegations Regarding the Use of Excessive Force in the Booking Procedure

A. Evidence

Ms. Gordon testified that both times she was incarcerated she was subjected to excessive force during the booking procedure when she refused to submit to fingerprinting without a Court order. The evidence shows that Ms. Gordon based her refusal upon the holding in Davis v.

Mississippi, 89 S.Ct. 1394 (1969).[2]

Ms. Gordon testified that following each refusal to

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[2]Davis v. Mississippi is inapplicable to the case at bar. In Davis, police executed a random dragnet and round-up of black male youths in Meridian following a rape in the victim's home. The youths were subjected to fingerprinting and routine questioning. The fingerprints were, then, compared with the prints found on the window sill and borders through which the assailant apparently gained access to the victim's home. Petitioner was one of the youths subjected to the round-up procedures. Petitioner's fingerprints matched the prints found on the window sill. The fingerprint evidence was used to indict and convict him. The state conceded that the prints were taken without a warrant and without probable cause. Thus, the evidence was obtained in violation of the Fourth Amendment. Based upon the Exclusionary Rule stated in Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) the Court found that the fingerprints were illegally seized evidence and, thus, inadmissible at trial. The Court indicated that detentions for the sole purpose of obtaining fingerprints might pass constitutional muster, absent a finding of probable cause "in the traditional sense," only if authorization by a judicial officer was obtained in advance of detention. Davis, 89 S.Ct. at 1398. In the instant case, the Fourth Amendment prerequisites had been complied with "in the traditional sense." In 1989, Ms. Gordon was incarcerated pursuant to a felony arrest warrant. Fingerprinting of one finger was required as a part of intra-jail identification procedures. In addition, state and federal law required jail officials to obtain a full set of fingerprints from felony arrestees. In Ms Gordon's case, the jail officials acceded to her refusal to submit to printing during the 1989 incarceration. But they compelled both the single print and the full set of prints upon the occasion of her second incarceration in 1990 on misdemeanor charges. While the officials conceded they were not required to take full sets of prints of misdemeanor arrestees, the officials testified that they believed they were justified in taking the full set of prints during the 1990 incarceration to complete her previous jail record and because the court guard who brought Ms. Gordon to the jail from the state court advised Defendant Waggnor, the duty sergeant on the evening of October 30, 1990, that Judge Hopper had ordered Ms. Gordon's prints taken with "Whatever force was necessary."

Thus, Davis is inapplicable to the instant case and Plaintiff's claim under the Fourth Amendment must fail for even if she had, and the Court does not so find, a constitutional right to a written Court order for fingerprints the Defendants under this set of facts are clearly entitled to "good faith" immunity because they could not reasonably have been expected to be aware of any such right.

submit to fingerprinting she was subjected to severe physical abuse by prison personnel. The testimony of the Defendant officials directly contradicted the Plaintiff's testimony. The Defendants' testimony was corroborated by the videotape of the 1990 booking incident. Plaintiff's expert witnesses who testified to evidence of soft tissue injury sustained by Plaintiff failed to establish a causal nexus between the apparent injury and the force allegedly employed by prison officials.

B. Legal Authority

In the prison setting, an inmate can establish an Eighth Amendment claim for cruel and unusual punishment only if he (or she) can show that prison officials inflicted "unnecessary and wanton" pain. See Whitley v. Albers, 106 S.Ct. 1078 (1986) (citations omitted). In analyzing whether an Eighth Amendment violation has occurred the Court must 1) decide whether the conduct complained of occurred and then 2) inquire into the states of mind of the officials accused of the conduct. Was it "wanton", which is to say, sadistic or malicious, or was it used in a good faith attempt to restore or maintain order? Id. at 1085.

C. Analysis

Applying the two-pronged test to the evidence presented to the Court the Court finds that:

1. Plaintiff's testimony was not credible, was not

corroborated by any physical evidence and was completely discredited by the videotape submitted to the Court by Plaintiff. The Court studied the tape at some length in order to ascertain whether there was any other evidence which would corroborate or even tend to support Plaintiff's accusations. The Court found that there was none. Rather, the Court found the evidence on the record supported Defendants' testimony that in 1989 no force was used to compel Plaintiff to submit to fingerprinting and that in 1990, prison officials held her in place while one officer used sufficient and reasonable force to pry open her fist and obtain a full - if blurred - set of prints.

2. The Court finds that the force employed by the officials was reasonable and applied in a good faith attempt to comply with the Court Order.

3. Accordingly, the Court finds that there is no constitutional or statutory basis for Ms. Gordon's claim for excessive force and the same must be DISMISSED.

IV. Remaining Claims

The balance of Ms. Gordon's claims require merely summary analysis:

A. False Arrest and False Imprisonment

Plaintiff failed to establish a prima facie case on these claims; indeed, beyond her bare conclusory statements to the effect that she had been falsely arrested and imprisoned, no evidence appears in the record in support of these claims. The Court, sua sponte, requested a copy of the felony arrest warrant for review and found it to be facially sufficient. Ms. Gordon's claim of False Arrest and False Imprisonment is, accordingly, DISMISSED.

B. Racial Discrimination and Persecution

Not one scintilla of evidence was presented in support of this claim. It is DISMISSED.

C. Sexual Harassment

Ms. Gordon testified to an isolated incident involving a remark and physical contact by a prison guard which Ms. Gordon interpreted to ne sexual harassment. Assuming that her uncorroborated testimony is credible, this incident would not sustain her claim for sexual harassment and it is, therefore, DISMISSED.

D. Federal Standards for Prisons and Jails

Ms. Gordon testified that the Tulsa City-County Jail did not comport with federal standards. The undisputed testimony of the Defendants was that the jail is not governed by federal standards but by the Oklahoma Minimum Jail Standards with which it was in full compliance. This claim is DISMISSED.

E. Fourteenth Amendment Due Process Claim

Ms. Gordon claims the fresh food she brought with her to jail was not returned to her. There was no indication that she was intentionally deprived of her property. Pursuant to Daniels v. Williams, 106 S.Ct. 662 (1986) this claim is DISMISSED.

F. Failure to Properly Train Jail Personnel

Ms. Gordon failed to show that Defendant jail personnel were inadequately trained. She failed entirely to meet her burden of proof under City of Canton, Ohio v. Harris, 109 S.Ct. 1197 (1989). This claim is DISMISSED.

G. Equal Protection Claim

Ms. Gordon offered no evidence that she was subjected to discriminatory classification. This claim is DISMISSED.

H. Conspiracy

Ms. Gordon made no showing of impermissible agreement and/or concerted action on the part of Defendants which was designed to deprive her of her federal rights. Griffin v. Breckinridge, 91 S.Ct. 1790 (1971). This claim is DISMISSED.

I. Loss of Consortium and Other Pendant State Claims

Because Plaintiff has failed to establish the requisite linch pin injuries attributable to Defendants, Mr. Gordon's loss of consortium claim must fail and is hereby DISMISSED along with the remaining state tort claims.

IT IS THEREFORE ORDERED that Plaintiffs' claims be dismissed in their entirety; Judgment be entered in favor of Defendants;

parties to bear their own respective costs.

So ORDERED this 31st day of August, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WILBURN A. HITT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	92-C-0111-B
	)	
SECRETARY OF HEALTH AND HUMAN SERVICES,	)	
	)	
Defendants.	)	

ORDER

Plaintiff Wilburn Hitt appeals the Secretary's decision to deny him Social Security benefits. The Secretary found that Mr. Hitt could not return to his past relevant work as a heavy machine operator, welder or night watchman. The Secretary did conclude, however, that Mr. Hitt could return to other types of work in the national economy. On appeal, two issues are raised by Mr. Hitt. First, he argues that the Administrative Law Judge ("ALJ") did not properly interpret 20 C.F.R. § 404.1563(d). Second, Mr. Hitt contends that the ALJ's hypothetical questioning was improper.

Mr. Hitt filed an application for benefits on February 23, 1988, alleging disability since July, 1985, due to a back injury, arthritis, liver problem and high blood pressure (Tr. 169-176). A hearing was held pursuant to Plaintiff's request, and an unfavorable decision was issued on May 25, 1989 (Tr. 63, 66-76, 82-113). The Appeals Council remanded the case and a supplemental hearing was held on August 15, 1990 (Tr. 60-62, 114-168).

The central issue is whether the ALJ properly followed 20 C.F.R. §404.1563(d). That statute states:

> **We consider that advanced age (55 or over) is the point where age significantly affects a person's ability to do substantial gainful activity. If you are severely impaired and of advanced age and you cannot do medium work...you may not be able to work unless you have skills that can be transferred to less demanding jobs which exist in significant numbers in the national economy.**

In this case, the Administrative Law Judge ("ALJ") found that Mr. Hitt could not return to his past relevant work. Consequently, at that point, the burden shifted to the Secretary to identify other jobs that Mr. Hitt could perform. When identifying those jobs, the Secretary is mandated to consider a claimant's age, education, residual functional capacity and his last 15 years of work experience. *See, 20 C.F.R. §§ 404.1520(f) and 404.1565(a).* That burden becomes more difficult once a claimant reaches 55 as one court explains:

> **As age is one of the factors that must be considered, it should surprise no one that the Secretary faces a more stringent burden when denying disability benefits to older claimants. Thus, while the Secretary can find younger claimants not disabled so long as they can perform unskilled work...the same is not true of claimants of advanced age (55 or over)...Accordingly, it is not enough that persons of advanced age are capable of doing unskilled work; to be not disabled, they must have acquired skills from their past work that are transferable to skilled or semi-skilled work. In addition, before the Secretary can find the claimant's skills transferable to sedentary work, he must show that very little, if any, vocational adjustment is required.** *Terry v. Sullivan*, 903 F.2d 1273, 1275 (9th Cir. 1990).[1]

In this case, the question is whether Mr. Hitt had any transferable skills after April 4, 1989 -- the day he turned 55.[2] If he had such skills, the next question is whether any vocational adjustment would have been required.

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[1] *The Tenth Circuit cites Terry for this proposition in Emory v. Sullivan, 936 F.2d 1092, 1094 (10th Cir. 1991).*

[2] *Hitt's alleged onset disability date is July of 1985. From that time until he reached his 55th birthday on April 4, 1989, this Court finds that substantial evidence does support the Secretary's finding that he did not have a disability.*

The evidence of particular importance comes from the testimony of the two vocational experts. Vocational Expert ("VE") Gary Clink stated at a hearing on February 19, 1989 that Mr. Hitt did not have transferable skills to sedentary work. Clink did testify that Mr. Hitt could work at unskilled jobs such as a "gate guard" and a security guard. *Transcript at 108-109.*

In the supplemental hearing, Vocational Expert Richard P. Bailey testified that Mr. Hitt did have transferable skills to semi-skilled jobs. Bailey stated that Mr. Hitt's experience as a scrap metal industrial heavy machine operator would allow transferable skills to a semiskilled area in crane and tower operators. *Id. at 150.* He also testified that Mr. Hitt's skills as a welder could be transferred to other welding and some assembly jobs. *Id. at 153.* However, in response to the ALJ's hypothetical questions, Bailey virtually eliminated most, if not all, of those jobs due to Mr. Hitt's physical limitations.[3] In addition, below is an exchange between Bailey and the ALJ:

> **ALJ: Would there be a major adjustment or minor? What are you saying, that there would be a minor adjustment with reference to the crane and maybe a major adjustment on the assembly?**
>
> **Bailey: Exactly, yes, sir, in my opinion there would be.**

After examining the evidence, the ALJ found that Mr. Hitt could lift and/or carry at least 20 pounds occasionally and 10 pounds frequently. Given that limitation, the ALJ concluded that Mr. Hitt could not return to his past relevant work as either a laborer or welder because the jobs required too much lifting and extensive repetitive efforts which he

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[3] *The ALJ found that Mr. Hitt's limitations included that he could walk and stand for six hours of an eight-hour work day, but could not do so continuously for more than an hour. The ALJ found that Mr. Hitt could occasionally climb, balance, stoop, crouch and crawl. The ALJ further found no restrictions on Mr. Hitt's ability to reach, handle, finger, feel, push, pull, see, hear, or speak other than some "crepitance" in his shoulders. Lastly, the ALJ found that the claimant could work at heights and around moving machinery.* Id. *at 43.*

would not be able to perform. The ALJ also apparently concluded that Mr. Hitt could not return to his past relevant work as a scrap metal industrial heavy machine operator because it required him to do repetitive actions and lift weights in excess of 20 pounds. *Id. at 44.*[4]

After concluding that Mr. Hitt could not return to his past relevant work, the ALJ proceeded to Step 5 of the sequential evaluation to determine whether the claimant could return to work elsewhere in the economy. Below is his analysis:

> **The testimony given by the vocational expert shows that the claimant does have transferable skills which he is capable of using in other work activity in the light and sedentary semiskilled range. Those jobs are listed above. None of those jobs require repetitive activity. None of them according to the manner in which the vocational expert described them would required him to perform any function that he is capable of performing.** *Id. at 44.*

Several problems surface with the ALJ's finding in light of §404.1563(d). First, in February of 1985, Clink -- the first vocational expert -- stated that Mr. Hitt had no transferable skills. The ALJ did not even mention Clink's testimony or attempt to explain why he apparently discounted Clink's statements. That should have been done.

Confusion also exists with Bailey's testimony. Of particular importance is the way the ALJ posed the hypothetical questions. He asked a series of questions of the ALJ, some of which were answered in favor of finding that Mr. Hitt had no transferable skills. For example, Bailey, at one point, stated that Mr. Hitt could only work as a security guard.[5]

A third problem is that the ALJ virtually ignored any finding as to what vocational

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[4] *The ALJ's wording concerning Mr. Hitt's past relevant work as a heavy machine operator is unclear.*

[5] *Asked the ALJ: "But are there any additional jobs that would go out, if I were to include [sic] that he could perform a full range of work, but that he would not be able to perform work which required frequent use of his upper and lower extremities for the operation of levers and/or foot controls?" Bailey said that all jobs would be eliminated except for security guard. Id. at 159. Part of the problem is that the ALJ never clarified what limitations he believed were true. A bigger dilemma is that he appeared to consider Hitt's alleged impairments individually instead of in combination. This, too, is in error. See Walker v. Bowen, 876 F.2d 1097, 1100 (4th Cir. 1989)("The Secretary must consider the combined effect of a claimant's impairments and adequately explain his evaluation of them. (emphasis added).*

adjustment would be needed by Mr. Hitt in transferring to the various jobs. As noted in 404.1563(d), the Secretary must show that very little, if any, vocational adjustment is required before a claimant's skills can be transferable. Bailey testified that transferring to a job as a crane operator would be minor while transfer to some of the other jobs would be a major adjustment. The ALJ, however, failed to discuss these distinctions or elaborate.

In sum, the ALJ's use of 20 C.F.R. §404.1563(d) was in error. It is unclear from the record whether substantial evidence supports his finding that Mr. Hitt, after he turned 55, had transferable skills to other skilled or semi-skilled work. One vocational expert testified that he did not; another said that he did, although the testimony is, itself, confusing.

In addition, the ALJ's explanation of his findings are unclear. Despite a thorough review of the medical evidence, the Court is unsure as to what type of work the ALJ can perform. Furthermore, and a deathknell in the Secretary's case, is that it is unclear as to what actual vocational adjustment is needed. It appears that the adjustment would be more than what §404.1563(d) allows.

Therefore, this Court **AFFIRMS** the Secretary's decision that Mr. Hitt was not disabled prior to his 55th birthday on April 4, 1989. However, the case is **REMANDED** so that the ALJ can re-evaluate the evidence in light of §404.1563(d) and the findings of this opinion, as to all matters subsequent to his 55th birthday..

SO ORDERED THIS 1st day of Sept, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROYCE G. CASKEY, et al.,

Plaintiffs,

vs.

JOHN A. RAYLL, JR., et al.,

Defendants.

No. 93-C-331-E

ORDER

Plaintiff is an inmate incarcerated within the Federal Bureau of Prisons. He filed a forty-seven page long civil RICO complaint pursuant to 28 U.S.C. § 1964. The court finds this entire action should be dismissed pursuant to 28 U.S.C. § 1915(d) and Fed. R. Civ. P. 12(b)(6).

Plaintiff initiated this action in forma pauperis pursuant to 28 U.S.C. § 1915. In Neitzke v. Williams, 490 U.S. 319 (1989), the Supreme Court recognized that a court is faced with two somewhat opposing responsibilities when determining which actions shall proceed with a plaintiff who is being allowed to commence an in forma pauperis action. First, a court must be sure that it complies with the "over-arching goal [of] the in forma pauperis statute: 'to assure equality of consideration for all litigants.'" Id. at 329, quoting Coppedge v. United States, 369 U.S. 438, 447 (1962). Commensurate with that responsibility, however, is the realization that § 1915(d) "is designed largely to discourage the filing of,

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and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of bringing suit and because of the threat of sanctions for bringing vexatious suits under Federal Rule of Civil Procedure 11." Id. at 327.

Consequently, courts have the responsibility to dismiss lawsuits which are frivolous or malicious. A complaint is frivolous where it lacks an arguable basis either in law or in fact. Id. at 325. The Supreme Court recently revisited Neitzke v. Williams in Denton v. Hernandez, ___ U.S. ___, 112 S.Ct. 1728 (1992). Denton emphasizes that a court is not bound to accept without question the truth of a plaintiff's allegations. Id. at 1733. The Court held that a dismissal under § 1915(d) is entrusted to the discretion of the court entertaining the in forma pauperis action, and should only be reviewed for an abuse of discretion. Id. at 1734.

Applying Neitzke and Denton to the case at hand, this court finds that Plaintiff's complaint lacks an arguable basis in fact, and should be dismissed as frivolous. In doing so, the court takes judicial notice of the record in the criminal action against Plaintiff in this court.

Regarding the legal merits of Plaintiff's RICO claims, the court finds them frivolous, and also finds they do not state a claim upon which relief can be granted. To state a civil RICO claim, Plaintiffs must allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985) (footnote omitted).

Plaintiffs' complaint is deficient in many aspects.

The predicate acts which may constitute "racketeering activity" are set forth in 18 U.S.C. § 1961(1). Plaintiff does not sufficiently allege facts to constitute any racketeering activity under § 1961(1). There is no allegation of wire fraud or mail fraud or any other proper predicate act made with particularity as to time, place, content and how any communication furthered a fraudulent scheme as required by Fed. R. Civ. P. 9(b). See Cayman Exploration Inc. v. United Gas Pipeline Co., 873 F.2d 1357, 1362 (10th Cir. 1989); Farlow v. Peat, Marwick, Mitchell & Co., 956 F.2d 982,989-90 (10th Cir. 1992).

Plaintiff has also failed to adequately allege a pattern of racketeering activity. Plaintiff cannot show the necessary continuity required by decisional law, such as continued fraud beyond the transaction in question, criminal activities of a continuing nature as part of the defendants' business, other alleged victims, a regular way of doing business through criminal activities, a long term association that exists for criminal purposes, or long time fraudulent activities. See Kehr Packages, Inc. v. Fidelcor Inc., 926 F.2d 1406, 1417 (3d Cir. 1991); Feinstein v. RTC, 942 F.2d 34 (1st Cir. 1991).

Other deficiencies include Plaintiff's failure to identify a proper enterprise, and failure to adequately allege a direct injury caused by racketeering. Plaintiff simply cannot state a valid RICO claim within the context of his claims. Because Plaintiff's federal RICO claims fail, his state claims can be dismissed as well.

Thus, for all the above reasons, this action is hereby **dismissed** pursuant to 28 U.S.C. § 1915(d) and Fed. R. Civ. P. 12(b)(6).

SO ORDERED THIS 1st day of September, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT IN AND FOR
THE NORTHERN DISTRICT OF OKLAHOMA

RESOLUTION TRUST CORPORATION, as CONSERVATOR for CIMARRON FEDERAL SAVINGS ASSOCIATION,

Plaintiff,

vs.

JIMMY M. SMITH; ROBERT D. MARSTERS; LONNIE E. SILER; LENA M. SILER; DONALD H. DINWIDDIE and MARY ANN DINWIDDIE, husband and wife; LAKELAND REAL ESTATE DEVELOPMENT, INC.; JAMES M. HENRY and KAREIN HENRY a/k/a KAREIN L. HENRY, husband and wife; QUINTON R. DODD and VICKIE E. DODD, husband and wife; UNITED STATES OF AMERICA, DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE,

Defendants.

Case No. 91-C-0609-B

ORDER CONFIRMING SHERIFF'S SALE AND DISTRIBUTING PROCEEDS

NOW, on this 18th day of August, 1993, this matter comes on for regular hearing upon the motion of the Plaintiff herein for confirmation and approval of the sale of real estate made by the Sheriff of Mayes County, Oklahoma, to James R. Harrison and Mary C. Harrison, on June 16, 1993, pursuant to a First Alias Special Execution and Order of Sale issued in this cause out of the office of the Court Clerk of the United States District Court for the Northern District of Oklahoma on May 11, 1993, said sale being of and conveying the following described real estate and all improvements thereon, situated in Mayes County, Oklahoma:

LOT NUMBERED TWO (2), IN BLOCK NUMBERED SIX (6), OF THE VILLAS OF LAKELAND, A SUBDIVISION IN MAYES COUNTY, STATE OF OKLAHOMA ACCORDING TO THE OFFICIAL SURVEY AND PLAT FILED FOR RECORD IN THE OFFICE OF THE COUNTY CLERK OF SAID COUNTY AND STATE,

and the Court, having examined the proceedings herein, including the proceedings of said Sheriff and his return thereof under the First Alias Special Execution and Order of Sale herein, finds that the same have been performed and done in all respects in full conformity with the law; that all parties claiming an interest in said property whose addresses were known to Plaintiff received actual notice of the sale; that the bid of James R. Harrison and Mary C. Harrison in the amount of $58,500.00 was the highest and best bid that could be obtained and such amount is at least two-thirds of the appraised value of such property; and that said sale was made after due and legal notice of the time and place of such sale.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Clerk make an entry on the journal that the Court is satisfied with the legality of said sale and the appropriateness of the notice given thereof.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the sale and all proceedings herein be and the same are hereby in all respects approved and confirmed; and that the Sheriff of Mayes County, Oklahoma, make, execute and deliver to the purchaser of said real estate a good and sufficient Sheriff's Deed for said real estate; and that the proceeds from the sale of the above

described property be distributed to the Resolution Trust Corporation, as Receiver for Cimarron Federal Savings Association.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, upon request by the purchaser of said real estate at said sale, a Writ of Assistance be issued by the Clerk of this Court to the Sheriff of Mayes County, Oklahoma, directing him to put said purchaser in full possession of said land.

SO ORDERED on this 18th day of August, 1993.

United States District Judge

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